Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1049

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Aliquippa and Southern Railroad Company, *et al.*,[1] petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. B, pp. 4a-30a) is reported at 583 F.2d 678 (3rd Cir. 1978). The decision of the Interstate Commerce Commission (App. C, pp. 31a-84a), which it sustained, is reported at 353 I.C.C. 567 (1977).

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[1] Petitioners are listed in the Appendix (App. A, pp. 1a-3a).

JURISDICTION

The order of the court of appeals denying petitioners' timely petition for rehearing *en banc* was denied on October 5, 1978 (App. D, p. 85a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). *Long Island Rail Road* v. *Aberdeen & Rockfish R.R.*, 99 S.Ct. 46 (1978); *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154 (1965).

QUESTION PRESENTED

Whether the court below erred in sustaining the decision of the Interstate Commerce Commission upon a basis not invoked by the agency itself, namely, that railroad demurrage charges are not "rates" or "charges" within the meaning of the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, and the Elkins Act, 49 U.S.C. § 11903.

STATUTES INVOLVED

Involved are the provisions of what formerly were sections 1(3)(a), 1(5), 1(6), 2, 3(1), 6(1), 15(6) and 15(15) of the Interstate Commerce Act, 49 U.S.C. §§ 10102(23), 10701(a), 10705, 10741(a), 10741(b), 10747, 10750, and 10761,[2] and former section 41(1) of the Elkins Act, 49 U.S.C. § 11903, the terms of which are set out in the appendix (App. E, pp. 86a-91a).

STATEMENT OF THE CASE

By notice of proposed rulemaking served October 19, 1972, the Interstate Commerce Commission recommended that railroads collecting demurrage charges be required to remit all but $10 per car per day to the carriers that owned the freight cars against which demurrage had accrued (App. F, pp. 92a-96a). A proceeding was instituted based upon thirteen provisions of the former Interstate Commerce Act,[3] the National Transportation Policy and the Administrative Procedure Act, and all railroads subject to the Interstate Commerce Act were made respondents.

The Commission determined, in its notice, that the $10 amount "appears to be more than adequate to compensate the railroad on whose lines the foreign car is being detained."[4] Although written statements of facts, views, and arguments concerning the proposed rule were invited, no hearing was scheduled at this or any other time of the proceeding.

On April 25, 1975, the Commission issued an interim report which supported adoption of the rule and held that private car owners (shippers and other investors) as well as railroad car owners should receive the demurrage revenue collected in excess of $10 per car per day.[5] The proceeding was reopened for further evi-

[2] Pub. L. No. 95-473, approved October 17, 1978, codified, without substantive change, the provisions of the Interstate Commerce Act and related laws.

[3] Former sections 1(4), 1(5), 1(6), 1(10), 1(11), 1(13), 1(14), 1(15), 1(17), 1(21), 6(7), 13(4), and 15(1) of the Interstate Commerce Act.

[4] The amount was determined, as stated by the Commission, simply because it was the first increment of demurrage charges that, at the time, generally was applied in increments of $10, $20, and $30 per car per day depending on the extent of the detention period (App. F, pp. 92a-93a).

[5] The Commission, in its interim report, "assume[d] that the first level of charges, currently $10 per day, will result in adequate retained revenue." *Remittance of Demurrage Charges*, 349 I.C.C. 411, 442 (1975). Although participants were invited to submit figures to overcome the Commission's presumption, the Commission denied petitioners' request for a hearing. 349 I.C.C. at 417.

dence concerning the costs, benefits, and feasibility of implementing the proposed rule, together with any additional argument on the Commission's clarification of the rule (App. G, pp. 97a-99a).

Prior to issuance of the Commission's final report, Congress amended former section 1(6) of the Interstate Commerce Act by inserting the following new sentence:

> Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.[6]

Comments were solicited by the Commission on the effect of the amendment on the proposed rule (App. H, pp. 100a-102a).

The Commission's final report and order was served April 7, 1977. The Commission found that it had jurisdiction to consider the proposed rule under both section 1(6) of the Interstate Commerce Act, as amended, and its car service powers, and that the remittance of all demurrage charges collected "in excess of $10 per car per day, is just, reasonable, and otherwise lawful" (App. C, p. 73a).

Following appeals to the Commission for reconsideration, which were denied, petitioners filed a petition

[6] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 211, 90 Stat. 46 (amending former section 1(6) of the Interstate Commerce Act, and now codified at 49 U.S.C. § 10750).

for judicial review of the Commission's decision.[7] On review, the court of appeals upheld the Commission's finding that section 1(6) of the Interstate Commerce Act authorizes it to promulgate the demurrage remittance rule (App. B, 13a) and held that the proposed rule was "rationally supported" as defined by the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A) applicable to notice and comment rulemaking (App. B, pp. 18a-19a).

Additionally, the court considered petitioners' claim that the proposed rule, by including private car owners as well as railroad car owners in the remittance scheme, permits the payment of unlawful rebates to shippers who are private car owners in violation of former section 15(15) of the Interstate Commerce Act, 49 U.S.C. § 10747, and former section 41(1) of the Elkins Act, 49 U.S.C. § 11903. Rejecting our arguments, the court (App. B, pp. 26a-27a) stated:

> "We have given careful consideration to these arguments and conclude that petitioners have misconstrued the purposes of § 15(15) and § 41(1), as well as the concept of demurrage.
>
> * * *
>
> Consequently, we do not believe that a demurrage charge can properly be understood as a "rate" under § 41(1), or as a "charge" as that term is used in § 15(15)."

The court concluded it was unable to say that the inclusion of private car owners in the Commission's

[7] A petition for judicial review in the United States Court of Appeals for the Third Circuit also was filed by thirty-three railroad petitioners and four intervening railroads. Both petitions were consolidated before the court of appeals.

demurrage remittance rule is a violation of the Interstate Commerce Act, and it did not express any conclusion with respect to potential violations of the Elkins Act (App. B, p. 29a). The court also did not address or even acknowledge petitioners' argument that the apportionment of demurrage revenues between carriers can be effected only in accordance with the procedures of former section 15(6) of the Act, 49 U.S.C. § 10705.

REASONS FOR GRANTING THE WRIT

Demurrage is a charge imposed by railroads upon shippers and receivers of freight who detain cars for loading or unloading beyond specified times.[8] "The purpose of demurrage charges," said this Court in *Pennsylvania R.R.* v. *Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920), "is to promote car efficiency by penalizing undue detention of cars. The duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate." Accord, *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry.*, 271 U.S. 259, 262 (1926).

That demurrage is a "rate" or "charge" within the regulatory scheme heretofore never has been doubted by the courts or the Commission. Demurrage uniformly has been held to require publication in tariffs as any

[8] Locklin, *Economics of Transportation* (7th ed. 1972) p. 587; Vanderblue and Burgess, *Railroads: Rates Service Management* (1924) pp. 257-258; Van Metre, *Industrial Traffic Management* (1953) pp. 315-318.

other rates or charges,[9] and it has been held to be lawful only if just and reasonable [10] and nondiscriminatory.[11]

In these respects, the courts and the Commission have treated demurrage no differently than they have other accessorial rates or charges, such as wharfage,[12] icing [13] and, as is most pertinent, reconsignment.[14]

The court below inexplicably held that demurrage was neither a "rate" nor a "charge." [15] It, accordingly, concluded that remittance of a portion of the demur-

[9] *Berwind—White Coal Mining Co.* v. *Chicago & E.R.R.*, 235 U.S. 371, 375 (1914); *Allied Chemical Corp.* v. *Burlington Northern, Inc.*, 353 I.C.C. 499, 501-502 (1977); *Schuhle's Grape Juice Co.* v. *Director General*, 63 I.C.C. 129, 132 (1921).

[10] *Swift & Co.* v. *Hocking Valley Ry.*, 243 U.S. 281, 290 (1917); *Allied Chemical Corp.* v. *Burlington Northern, Inc.*, 353 I.C.C. 499, 501-502 (1977); *International Proteins Corp.* v. *Baltimore & O.R.R.*, 355 I.C.C. 137 (1976).

[11] *Pennsylvania R.R.* v. *Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323-324 (1920); *Galveston Commercial Ass'n* v. *Atchison T. & S.F. Ry.*, 25 I.C.C. 216, 227 (1912).

[12] *United States* v. *ICC*, 352 U.S. 158, 162 (1956); *Cancellation of Wharfage Absorption*, 335 I.C.C. 477, 522 (1969).

[13] *Alton & S.R.R.* v. *United States*, 49 F.2d 414, 427 (N.D. Cal. 1931); *Red Ball Vegetable Co.* v. *Illinois Central R.R.*, 197 I.C.C. 385, 390-391 (1933).

[14] *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry.*, 271 U.S. 259, 263 (1926); *Detroit Produce Ass'n* v. *Director General*, 62 I.C.C. 283, 286 (1921).

[15] *Iverson* v. *United States*, 63 F. Supp. 1001 (D.D.C. 1946), relied on by the court of appeals, is inapposite. That case merely upheld the I.C.C.'s power to increase the amount of demurrage assessed upon cars in critical short supply, pursuant to the provisions of former section 1(15) of the Act, 49 U.S.C. § 11123, which, by its terms, allows the agency to adjust "any or all rules, regulations, or practices" of the carriers affecting car service.

rage collected by the railroads to the shippers furnishing their equipment could not be a rebate, within the meaning of former section 41(1) of the Elkins Act, 49 U.S.C. § 11903. The lower court's construction of the law is an impermissibly narrow one; this court often has held that rate concessions, no matter what form they may take and no matter how indirectly they may be given, are proscribed.[16] Indeed, in *United States* v. *Philadelphia & R. Ry.*, 184 F. 543, 544 (C.C. E.D. Pa. 1910), the court specifically held that a jury can properly find an unlawful concession where a railroad failed to collect and retain its entire published tariff rates with regard to demurrage charges:

> "[T]he verdict establishes the contention of the government that it was not a valid settlement of a disputed claim but was the cancellation of a demurrage charge by the defendant for the purpose of making a concession . . . in the matter of charges, in violation of the Interstate Commerce Act."

The lower court's conclusion, of course, did not track the Commission's. The Commission found that its proposed regulation would not result in the payment of a rebate to the shippers furnishing their equipment, not because demurrage was neither a rate nor a charge, but because "the delivering carrier will receive its full rate and compensation for all demurrage charges and will merely remit the excess to the car owner." 353 I.C.C. at 594 (App. C, p. 70a).

Thus, the court below upheld the Commission's decision on a ground altogether different than had been invoked by the agency. This clearly is error and contrary to the fundamental rule of administrative law set forth by this Court in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "[A] reviewing court, in dealing with a determination or judgment, which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

Accord, *FPC* v. *Texaco*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169 (1962).

The lower court's error colors all of its decision. Not merely did it mistakenly conclude that payment to shippers of a portion of demurrage collected from shippers furnishing their equipment, in compliance with the Commission's proposed regulation, would not be a rebate. The perception of the court below that demurrage is neither a "rate" nor a "charge" led it to disregard our argument, without so much as a footnote comment that, on carrier-owned equipment, the division of revenues between the railroads can be effected only in accordance with the procedures of former section 15(6) of the Act, 49 U.S.C. § 10705. That provision obliges a "hearing" and an evidentiary record that comprehends the several factors that the Commission must consider in prescribing a division of revenues.[17]

[16] *United States* v. *Braverman*, 373 U.S. 405 (1963); *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 353 (1940); *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 485 (1939).

[17] See *United States* v. *Florida East Coast Ry.*, 410 U.S. 244, 238 (1973); *Ligon Specialized Hauler* v. *ICC*, Nos. 77-3302, 77-3253 (3rd Cir. November 14, 1978).

This Court, in *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87, 92 (1968), affirmed a district court's remand of a Commission order which prescribed divisions between northern and southern railroads based on an insufficient record:

> "If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is. The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming "a monster which rules with no practical limits on its discretion" (citation omitted)."

The Commission's decision regarding the amount of demurrage to be retained by the delivering carrier was determined on a record woefully insufficient to support such a division of revenues. The lower court overlooked this insufficiency by applying the wrong standard of judicial review.[18] In fact, the Commission decided the split of demurrage revenues initially without benefit of any record or opportunity by petitioners to present within the appropriate statutory framework

[18] *Aberdeen & Rockfish R.R.* v. *United States*, 270 F. Supp. 695, 710 (E.D. La. 1967), aff'd as modified, 393 U.S. 87 (1968); *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661, 674 (D. Mass. 1962), aff'd *mem.*, 371 U.S. 26 (1962).

their evidence concerning a just and reasonable apportionment.[19]

Petitioners do not dispute the need for an adequate freight car supply and better freight car utilization. Their self interest obliges both. Obviously, the Commission must consider these factors, specifically enumerated by the Congress in the amendment to former section 1(6) of the Act, 49 U.S.C. § 10750, in promulgating rules and regulations relating to demurrage. But as long as the Commission's demurrage remittance rule will result in a division of revenues between carriers, the Commission also is required to adhere to the applicable procedures under former section 15(6) of the Act, 49 U.S.C. § 10705.[20]

The procedural requirements of 49 U.S.C. § 10705 in no way conflict with agency attention to the additional factors of section 1(6).[21] If there is to be a remittance to the owning railroad of a portion of the demurrage collected by the originating or delivering carrier, the factors contained in section 1(6) certainly can be included among those that must be considered by the Commission in fixing the split of revenues between participating lines.

Petitioners are being asked to share with the car owners revenues they previously collected and retained in full. The Commission's apportionment of those rev-

[19] The notice instituting the administrative proceeding proclaimed that the $10.00 amount "appears to be more than adequate to compensate the railroad on whose lines the foreign car is being detained" (App. F, p. 93a).

[20] *Baltimore & O.R.R.* v. *United States*, 277 U.S. 291, 300-302 (1928).

[21] See, e.g., *ICC* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

enues, on a basis predetermined by the Commission, without adherence to the procedural requirements under 49 U.S.C. § 10705, will be devastating to several of the petitioners and in turn impair their ability to supply transportation service to the public.

For example, petitioner Canton Railroad submitted evidence to the Commission that it received $66,310 in demurrage revenues during the first quarter of 1975. Application of the Commission's demurrage rule would reduce its demurrage revenues to $36,532, which would result in an annualized loss of demurrage revenues of $119,112. Considering that petitioner's reported net income for 1975 was $68,000, the effect of the Commission's order is ruinous.

The court below dismissed with a cursory footnote (App. B, p. 17a), the havoc to be wrought upon several of the petitioners, and ignored petitioners' right to present evidence pursuant to 49 U.S.C. § 10705 regarding the justness and reasonableness of the division of revenues ordered. If, as the Commission now evidently believes, demurrage is to be treated as revenue to be apportioned between several carriers, it has no choice but to observe the procedural safeguards of 49 U.S.C. § 10705.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 1978

APPENDIX

APPENDIX A

Petitioners are:

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY; CHESTNUT RIDGE RAILWAY COMPANY; EAST ERIE COMMERCIAL RAILROAD; EAST JERSEY RAILROAD AND TERMINAL COMPANY; GETTYSBURG RAILROAD COMPANY; LAKE ERIE, FRANKLIN & CLARION RAILROAD COMPANY; McKEESPORT CONNECTING RAILROAD COMPANY; MONONGAHELA CONNECTING RAILROAD COMPANY (THE); MORRISTOWN AND ERIE RAILROAD COMPANY; NORTHAMPTON AND BATH RAILROAD COMPANY; PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY; PITTSBURGH AND OHIO VALLEY RAILWAY COMPANY; PORT JERSEY RAILROAD; RAHWAY VALLEY RAILROAD; UNION RAILROAD COMPANY; UPPER MERION AND PLYMOUTH RAILROAD COMPANY; AMERICAN SHORT LINE RAILROAD ASSOCIATION; ABERDEEN AND ROCKFISH RAILROAD COMPANY; ALEXANDER RAILROAD COMPANY; APACHE RAILWAY COMPANY (THE); ARCATA AND MAD RIVER RAILROAD COMPANY (THE); ARKANSAS & LOUISIANA MISSOURI RAILWAY COMPANY; ASHLEY, DREW & NORTHERN RAILWAY COMPANY; BELFAST & MOOSEHEAD LAKE RAILROAD COMPANY; BELTON RAILROAD COMPANY; BERLIN MILLS RAILWAY COMPANY; BIRMINGHAM SOUTHERN RAILROAD COMPANY; BROOKLYN EASTERN DISTRICT TERMINAL RAILROAD; BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY; CANTON RAILROAD COMPANY; CARBON COUNTY RAILWAY COMPANY; CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY; CENTRAL NEW YORK RAILROAD CORPORATION; CHATTAHOOCHEE INDUSTRIAL RAILROAD; CHATTAHOOCHEE VALLEY RAILWAY COMPANY; CHICAGO SHORT LINE RAILWAY COMPANY; CHICAGO, WEST PULLMAN AND SOUTHERN RAILROAD COMPANY; CITY OF PRINEVILLE RAILWAY; CLAREMONT AND CONCORD RAILWAY COMPANY; COLORADO & WYOMING RAILWAY COMPANY; COOPERSTOWN & CHARLOTTE VALLEY RAILWAY CORPORATION; CUYAHOGA VALLEY RAILWAY COMPANY

(THE); DANSVILLE AND MOUNT MORRIS RAILROAD COMPANY; DARDANELLE & RUSSELLVILLE RAILROAD COMPANY; DELRAY CONNECTING RAILROAD COMPANY; DEQUEEN AND EASTERN RAILROAD COMPANY; DULUTH & NORTHEASTERN RAILROAD COMPANY; EAST CAMDEN & HIGHLAND RAILROAD COMPANY; ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY; FAIRPORT, PAINESVILLE AND EASTERN RAILWAY COMPANY; FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY; FORE RIVER RAILROAD CORPORATION; FRANKFORT AND CINCINNATI RAILROAD COMPANY; GREAT SOUTHWEST RAILROAD INCORPORATED; GREEN MOUNTAIN RAILROAD CORPORATION; GREENVILLE AND NORTHERN RAILWAY COMPANY; IOWA TERMINAL RAILROAD COMPANY; JOHNSTOWN AND STONY CREEK RAILROAD COMPANY; KENTUCKY AND TENNESSEE RAILWAY; LACKAWAXEN AND STOURBRIDGE RAILROAD CORPORATION; LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY; LAKE TERMINAL RAILROAD COMPANY (THE); LAONA & NORTHERN RAILWAY COMPANY; LASALLE AND BUREAU COUNTY RAILROAD COMPANY (THE); LAURINBURG AND SOUTHERN RAILROAD COMPANY; LONG ISLAND RAIL ROAD COMPANY (THE); LONGVIEW PORTLAND & NORTHERN RAILWAY COMPANY; MANUFACTURERS' JUNCTION RAILWAY COMPANY; MARINETTE, TOMAHAWK AND WESTERN RAILROAD COMPANY; MERIDIAN & BIGBEE RAILROAD COMPANY; MICHIGAN NORTHERN RAILWAY COMPANY, INC.; MIDDLETOWN AND NEW JERSEY RAILWAY COMPANY INCORPORATED; MINNEAPOLIS, NORTHFIELD AND SOUTHERN RAILWAY; MINNESOTA TRANSFER RAILWAY COMPANY; MISSISSIPPI EXPORT RAILROAD COMPANY; MODESTO AND EMPIRE TRANCTION COMPANY; MONTPELIER & BARRE RAILROAD COMPANY; NEVADA NORTHERN RAILWAY COMPANY; NEWBURGH AND SOUTH SHORE RAILWAY COMPANY (THE); NORTH LOUISIANA & GULF RAILROAD COMPANY; OREGON & NORTHWESTERN RAILROAD COMPANY; PEARL RIVER VALLEY RAILROAD COMPANY; PECOS VALLEY SOUTHERN RAILWAY COMPANY (THE); PORT HURON AND DETROIT RAILROAD COMPANY; PRES-

COTT AND NORTHWESTERN RAILROAD COMPANY (THE); PROVIDENCE AND WORCESTER COMPANY; RIVER TERMINAL RAILWAY COMPANY (THE); SABINE RIVER & NORTHERN RAILROAD COMPANY; SALT LAKE, GARFIELD AND WESTERN RAILWAY COMPANY; SAND SPRINGS RAILWAY COMPANY; SANDERSVILLE RAILROAD COMPANY; SAVANNAH STATE DOCKS RAILROAD COMPANY; STOCKTON TERMINAL AND EASTERN RAILROAD; TERMINAL RAILWAY ALABAMA STATE DOCKS; TEXAS & NORTHERN RAILWAY COMPANY; TEXAS, OKLAHOMA & EASTERN RAILROAD COMPANY; TEXAS SOUTH-EASTERN RAILROAD COMPANY; TRONA RAILWAY COMPANY; TULSA-SAPULA UNION RAILWAY COMPANY; VALDOSTA SOUTHERN RAILROAD; VENTURA COUNTY RAILWAY COMPANY; WARREN & SALINE RIVER RAILROAD COMPANY; WYANDOTTE SOUTHERN RAILROAD COMPANY; WYANDOTTE TERMINAL RAILROAD COMPANY; and YOUNGSTOWN AND NORTHERN RAILROAD COMPANY (THE).

APPENDIX B

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY et al., *Petitioners,*

v.

UNITED STATES of America and Interstate Commerce Commission, *Respondents,*

Central Vermont Railway, Inc., Duluth, Winnipeg and Pacific Railway, and the Detroit and Toledo Shore Line Railroad Company, *Intervenors,*

Burlington Northern Inc. and Union Pacific Railroad Company, *Intervenors,*

Duval Sales Corporation, International Minerals & Chemical Corporation, Evans Products Company and Pullman Leasing Company, *Intervenors,*

The Texas Mexican Railway Company, *Intervenor.*

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY et al., *Petitioners,*

v.

UNITED STATES of America and the Interstate Commerce Commission, *Respondents,*

Duval Sales Corporation, International Minerals & Chemical Corporation, Evans Products Company and Pullman Leasing Company, *Intervenors,*

The Texas Mexican Railway Company, *Intervenor.*

Nos. 77-1714, 77-1732.

Argued July 25, 1978.

Decided Sept. 6, 1978.

Before ADAMS, WEIS and HIGGINBOTHAM, Circuit Judges.

OPINION OF THE COURT

ADAMS, Circuit Judge

Petitioners in these consolidated cases [1] request us to set aside an order of the Interstate Commerce Commission (ICC) entered on April 7, 1977, in Ex Parte No. 289, "Remittance of Demurrage Charges by Common Carriers of Property by Rail." [2] By its order, the ICC adopted a regulation requiring the remittance to freight car owners of all demurrage charges collected by the delivering carrier that are in excess of ten dollars per day per car.[3] Specifically, petitioners maintain that the order exceeds the statutory power of the agency; that it is arbitrary, capricious, and without rational basis; and that it fails to comply with the Administrative Procedure Act (APA) [4] and the Interstate Commerce Act (ICA).[5]

For the reasons set forth below, we deny petitioners' request.

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[1] In No. 77-1714, a petition was filed on behalf of thirty-three railroad petitioners and four intervening railroads for review of the ICC's order in Ex Parte 289. In No. 77-1732, a petition for review was filed by the 214 member railroads of the American Short Line Railroad Association. Both petitions are brought pursuant to 28 U.S.C.A. §§ 2321, 2342, and 2344 (1978) to enjoin a final order of the ICC.

[2] 353 I.C.C. 567 (1977); 42 Fed.Reg. 19146; 39390 (1977) (to be codified in 49 C.F.R. § 1254.10).

[3] Demurrage is the charge imposed upon shippers and receivers for the detention of freight cars beyond the allotted free time period for loading and unloading. Traditionally, all demurrage payments have been made to and retained by the delivering carriers. Under the ICC order at issue here, these payments would be remitted by the delivering railroads to the freight car owners.

[4] 5 U.S.C.A. § 551 *et seq.* (1977 & Supp. 1978).

[5] 49 U.S.C.A. § 1 *et seq.* (1949, 1951 & Supp. 1978).

I.

The regulation at issue is a recent attempt by the ICC to deal with the long-standing shortage in this country of railroad freight cars.[6] The car shortage, resulting from both an insufficient supply and an inefficient utilization of freight cars, is an outgrowth of the present national car-pool system. Under the system, the freight cars that are owned by *individual* railroads constitute a single, common pool, used by *all* rail carriers. Thus, the same loaded freight car is transported over the lines of different connecting carriers to the ultimate destination point. While more efficient than the earlier practice of shifting freight from the car of one carrier to the car of another, the pool system has at the same time made it more advantageous economically for railroads to utilize the freight cars of the originating carriers than to purchase and maintain their own. The national freight car shortage is the acknowledged result.[7]

During the past several years, the ICC has taken a number of major actions in an attempt to ease the car shortage: (1) it has adopted various "car service" rules to regulate the placement and movement of freight cars;[8] (2) it has established a uniform schedule of "per diem" charges, which are those incurred daily by one railroad for the use

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[6] *See United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 230-31, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743-46, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972); Note, *The Freight Car Shortage and ICC Regulation*, 85 Harv.L.Rev. 1583 (1972).

[7] *See, e. g., United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. at 745-46, 92 S.Ct. 1941.

[8] *See, e. g., ICC v. Oregon Pac. Indus., Inc.*, 420 U.S. 184, 95 S.Ct. 909, 43 L.Ed.2d 121 (1975); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 92 S.Ct. 1941, 32 L.Ed.2d 453; *Reading Co. v. Commodity Credit Corp.*, 289 F.2d 744 (3d Cir. 1961).

of another's cars;[9] (3) it has added an "incentive" element to the basic per diem rate;[10] and (4) it has imposed an increase in demurrage charges.[11]

Ex Parte No. 289, the proceeding in question here, was instituted in October 1972, to determine whether remittance of the penalty portion[12] of the demurrage charges to the carriers owning the cars would create an added incentive for such carriers to acquire additional cars. Following notice in the *Federal Register*[13] and submission of written statements by a number of the ninety-seven participating parties, the ICC, on April 25, 1975, issued its Interim Report.[14] The Report adopted the principle of the proposed remittance rule and reopened the proceeding for receipt of additional evidence regarding the plan's feasibility and costs. Following notice of the proposed further rulemaking,[15] one hundred-eighteen parties submitted additional information to the ICC.

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[9] *See Union Pac. R. R. Co. v. United States*, 300 F.Supp. 318 (D.Nev.1969); *Boston & Me. R. R. v. United States*, 297 F.Supp. 615 (D.Mass.), *aff'd per curiam*, 396 U.S. 27, 90 S.Ct. 196, 24 L.Ed.2d 142 (1969).

[10] *See United States v. Florida E. Coast Ry. Co.*, 410 U.S. at 224, 93 S.Ct. 810, *on remand*, 368 F.Supp. 1009 (M.D.Fla.1973), *aff'd mem.*, 417 U.S. 901, 94 S.Ct. 2595, 41 L.Ed.2d 207 (1974).

[11] *See General Mills, Inc. v. United States*, 364 F.Supp. 1278 (D.Minn.1973).

[12] Demurrage charges consist of both penalty and compensatory elements. *See ICC v. Oregon Pac. Indus., Inc.*, 420 U.S. at 189-191, 95 S.Ct. 909. The latter element is that portion of the demurrage charge which serves to compensate the railroad for the additional per diem payments it must make to the car owner as a result of the loading or unloading delay. The remainder of the demurrage charge is understood as the penalty portion.

[13] 37 Fed. Reg. 22884 (1972).

[14] 349 I.C.C. 411 (1975).

[15] 40 Fed.Reg. 18797 (1975).

On April 7, 1977, the ICC issued its Report and Order in Ex Parte No. 289.[16] It concluded that adoption of the proposed remittance rule would be beneficial to the public and the rail industry, as well as administratively feasible. Consequently, the agency directed that the rule become effective on July 6, 1977. However, the effective date was subsequently stayed by the ICC pending judicial review.

II.

A.

The principal argument made in support of the petition to set aside the order in question is that the ICC lacks a statutory base to promulgate the demurrage remittance rule. The ICC, in turn, contends that it does have the requisite authority under 49 U.S.C.A. § 1(6)(Supp.1978), as amended by the Rail Revitalization and Regulatory Reform Act of 1976 (4R Act).[17]

The 4R Act added a provision to § 1(6) which states that "[d]emurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect

[16] 353 I.C.C. 567 (1977).

[17] Pub.L.No.94-210, § 211, 90 Stat. 31, 46 (1976). In its Interim Report of April 1975, the Commission found that it had jurisdiction under three car service provisions of the ICA, 49 U.S.C.A. §§ 1(11), 1(14)(a), and 1(15) (1959 & Supp.1978). Subsequent to the Report, the 4R Act was enacted, and on March 3, 1976, the ICC solicited comments on the effect of the new legislation. In its final Report and Order of April 1977, as well as in its brief submitted to this Court, the ICC, while continuing to assert that it has authority to promulgate the remittance rule under the three above-mentioned sections, relied principally upon the amended version of § 1(6). In light of our holding that § 1(6) provides the ICC with the necessary authority to promulgate the demurrage remittance rule in question it is unnecessary to decide whether jurisdiction might properly be founded upon §§ 1(11), 1(14)(a), and 1(15) as well.

to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property." [18] Petitioners assert that the statutory directive that "demurrage charges shall be computed" cannot properly be interpreted to authorize the ICC to "divide" demurrage revenues between the delivering carrier and the owner of the car.

In analyzing a question of statutory construction, the Supreme Court has said that it accords deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall* v. *Tallman.*[19] While

[18] 49 U.S.C.A. § 1(6), (Supp.1978), in full, provides:

> It is made the duty of all common carriers to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

[19] 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). *Accord, Batterton v. Francis,* 432 U.S. 416, 424, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977); *Lehigh & New Eng. Ry. Co. v. ICC,* 540 F.2d 71, 80

the agency's interpretation is by no means controlling,[20] to sustain the ICC it is necessary only that we find its interpretation to be a reasonable one.[21] As *Tallman* recognized, "we need not find that [an agency's] construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." [22]

Petitioners in the present situation argue that the plain meaning of the phrase "demurrage charges shall be computed" should control, that previous use of the term by the ICC does not indicate an understanding that it confers upon the agency the power to divide demurrage revenues, and that the division of revenues is such a substantial change from prior practice that an express authorization by Congress to divide demurrage charges is required.

While the language of § 1(6) does not specifically authorize remittance to car owners, it is equally clear that the statute does not prohibit such an arrangement. By focusing solely upon the phrase "shall be computed", petitioners tend to restrict what appears to be the rather broad authorization granted to the ICC by the 1976 amendments to § 1(6).[23] Indeed, the provision not only directs the ICC to

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(3d Cir. 1976), *cert. denied*, 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed. 2d 776 (1977); *Lucas Coal Co. v. Interior Bd. of Mine Operations Appeals*, 522 F.2d 581, 584 (3d Cir. 1975).

[20] *See Batterton v. Francis*, 432 U.S. at 424, 97 S.Ct. 2399.

[21] *See Udall v. Tallman*, 380 U.S. at 16, 85 S.Ct. 792.

[22] *Udall v. Tallman*, 380 U.S. at 16, 85 S.Ct. at 801, *quoting with approval Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 91 L.Ed. 136 (1946).

[23] As this Court stated in *Lehigh and New Eng. Ry. Co. v. ICC*, 540 F.2d at 80, "[s]urely, the scope of the Commission's responsibilities under the Act requires a generous construction of its statutory authority."

compute demurrage charges with the purpose of enhancing freight car supply, utilization, and distribution but also mandates the agency to establish "rules and regulations relating to such charges."

The legislative history of the 4R Act further indicates the appropriateness of a broad reading of the amendment to § 1(6). The statute encompassing the provision was enacted by Congress for the general purpose of revitalizing a sagging railroad industry.[24] It was the declared policy of Congress, among other things, to balance the needs of carriers, shippers, and the public; to help place the nation's railroads in a position competitive with that of other modes of transportation, so as to promote more adequate and efficient transportation services; and to increase the attractiveness of investing in railroads and rail-service-related enterprises.[25]

One of the means of fulfilling these aims was the amendment pertaining to demurrage charges. That provision, comprising only eight lines in the 120-page statute, understandably did not attract much congressional comment.[26] The few portions of the legislative history that deal with the demurrage provision, however, lend support to the ICC's broad interpretation of § 1(6).

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[24] *See* Pub.L.No.94-210, § 101, 90 Stat. 31, 33 (1976) (codified at 45 U.S.C.A. § 801 (Supp. 1978)).

[25] *Id.*

[26] The debates on the floors of the Senate and House of Representatives fail to offer any insight into congressional thought with regard to the demurrage provision, for the section was never mentioned other than in the reading of the bill. Rather, the debates focused on the Final System Plan and other provisions of the 4R Act involving financial assistance by the federal government to the railroads. *See* 121 Cong.Rec. 38117, 38441, 41334, 41888, 42169 (1975); 122 Cong.Rec. H92, S271, S741, H401 (daily eds. Jan. 20, 21 & 28, 1976).

During the initial review of the railroad reform legislation in the House of Representatives, the Committee on Interstate and Foreign Commerce was informed of the ICC's pending consideration of the demurrage remittance rule in Ex Parte No. 289, and it gave no indication of its disapproval.[27] This is of special significance in light of the Supreme Court's holding in *Zuber* v. *Allen* [28] that an agency's interpretation of the statute it is charged with implementing "carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. . . . In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation." [29] In addition, we find substantial support for the ICC's interpretation of the demurrage provision in the Joint Explanatory Statements of the Conference Committee. It declared with regard to the section: "Other amendment made by this title: . . ***requires*** the Commission to establish rules and regulations for the

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[27] The Committee received a letter from ICC Acting Chairman O'Neal with his comments on the proposed 4R Act. In his analysis of the demurrage provision, the Acting Chairman stated:

> Another proceeeding, Ex Parte No. 289, ***Remittance of Demurrage Charges by Common Carriers of Property by Rail,*** concerns a proposed rule requiring remittance to the car owner by a non-owning road of all demurrage charges in excess of $10 per day per car. The purposes of the proposals are to create an added incentive for the car owner to acquire additional cars and to remove any inducement to the non-owner to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

See Report of the Committee on Interstate and Foreign Commerce, H.R.Rep. No. 725, 94th Cong., 1st Sess. 240 (1975).

[28] 396 U.S. 168, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

[29] *Id.* at 192, 90 S.Ct. at 327.

computation of demurrage charges so that freight car utilization is maximized and *car owners receive adequate compensation . . .*" [30]

In light of this statutory history, and the goals of the legislation, we are unable to say that the ICC's views that § 1(6) authorizes it to promulgate the present demurrage remittance rule is an unreasonable one.

B.

Petitioners also contend that the order in Ex Parte No. 289, even if within the ICC's power, must be set aside as arbitrary and capricious and as unsupported by substantial evidence. In this regard, petitioners assert that the applicable standard of review is the one established by the APA 5 U.S.C.A. § 706 (1977), and that the ICC determination, by failing to demonstrate a sufficient nexus between demurrage remittance and improved freight car utilization and supply, cannot survive such review.

Section 706(2) requires, *inter alia,* that the reviewing court hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . ." [31] Since the present proceeding involves no-

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[30] Final Conference Report, S.Rep. No. 595 and H.R.Rep. No. 781, 94th Cong., 2d Sess. 135, *reprinted in* [1976] U.S.Code & Admin.News, pp. 149, 150 (emphasis added). Similar statements are found in the other committee reports which discussed the demurrage provision. *See* Conference Report, S.Rep. No. 585 and H.R. Rep. No. 768, 94th Cong., 1st Sess. 128 (1975); Report of the Committee on Interstate and Foreign Commerce, H.R.Rep. No. 725, 94th Cong., 1st Sess. 73 (1975).

[31] Id. 5 U.S.C.A. §§ 556 and 557 (1977) establish procedural requirements for hearings mandated by §§ 553 or 554.

tice and comment rulemaking under 5 U.S.C.A. § 553 (1977),[32] and is not one "reviewed on the record of an agency hearing provided by statute,"[33] the "substantial evidence" test of § 706(2)(E) would not appear to be applicable.[34] As we recently stated in *Ford Motor Co.* v. *United States*,[35] the basic standard of review in proceedings such as this one is the "arbitrary and capricious" standard of § 706(2)(A).[36]

It is generally settled that the scope of review of agency actions under § 706(2)(A) is narrow.[37] A unanimous Su-

[32] 5 U.S.C.A. § 551 (1977) defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." "Rulemaking" is defined in that same section as "agency process for formulating, amending, or repealing a rule." *Id.* Ex Parte No. 289 clearly falls within this category of proceeding.

[33] 5 U.S.C.A. § 706(2)(E) (1977).

[34] *See, e. g., Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 622 n. 19, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973); *American Iron and Steel Inst. v. EPA*, 568 F.2d 284, 296 (3d Cir. 1977); *Asphalt Roofing Mfrs. Ass'n v. ICC*, 567 F.2d 994, 1002 n. 5 (D.C. Cir. 1977); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 700-701 (2d Cir.), *cert. denied*, 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 445 (1975); K. Davis, Administrative Law of the Seventies, § 29.01-3 (1976).

[35] 569 F.2d 196 (3d Cir. 1977), *cert. denied*, —— U.S. ——, 98 S.Ct. 2844, 56 L.Ed.2d 785 (1978).

[36] *See id.* at 198.

[37] *See, e. g. Bowman Transp. v. Arkansas Best Freight Sys.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. at 749, 92 S.Ct. 1941; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Ford Motor Co. v. United States*, 569 F.2d at 198-99. Several courts of appeals, including this one, have observed that in notice and comment rulemaking the "arbitrary and capricious" and "substantial evidence"

preme Court noted in *United States* v. *Allegheny-Ludlum Steel*[38] that "[w]e do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported."[39] Accordingly, we examine the evidence and arguments offered by the ICC in order to determine whether the demurrage remittance rule is "rationally supported."

In its Interim Report and final Report and Order, the ICC extensively discussed the arguments of both proponents and opponents of the remittance rule, and concluded that the rule would likely achieve its intended purpose of increasing freight car supply and utilization. Its reasoning was forthright, relying upon "the fundamental economic proposition that a greater return on an investment will provide an increased incentive to invest in that item, whether it be stocks, cars, or as in this case, freight cars."[40] While

criteria tend to converge. *See, e. g., Synthetic Organic Chem. Mfrs. Ass'n v. Brennan*, 503 F.2d 1155, 1158 (3d Cir 1974), *cert. denied*, 420 U.S. 973, 95 S.Ct. 1396, 43 L.Ed.2d 653 (1975); *Associated Indus., Inc. v. United States Dep't of Labor*, 487 F.2d 342, 350 (2d Cir. 1973) (Friendly, J.). *See generally* Friendly, *"Some Kind of Hearing"*, 123 U. of Pa.L.Rev. 1267, 1313 (1975); Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38, 46-51 (1975). Of course, an agency decision without *any* evidentiary support, in the administrative record will not be upheld. The evidence presented, however, need only establish a rational basis, rather than substantial support, for the agency action. *See Almay Inc. v. Califano*, 569 F.2d 674, 680-81 (D.C. Cir. 1978).

[38] 406 U.S. 742, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972).

[39] *Id.* at 749, 92 S.Ct. at 1946. *Accord, Ford Motor Co. v. United States*, 569 F.2d at 199.

[40] 353 ICC at 589. As the ICC continued:

> As demurrage regulations presently exist, the delivering carrier, who may not own one freight car, is nevertheless

admitting that return on investment would be only one of several factors affecting a decision whether to purchase freight cars, the ICC claimed that the rule would at least tend to encourage such decision. Moreover, the agency concluded that the remittance rule would have an affirmative effect upon the supply of cars. Pointing to evidence adduced in earlier proceedings that large sums of demurrage charges remained uncollected by the carriers, the ICC reasoned that the requirement of the remittance rule, which is based on billed rather than collected demurrage charges, would likely encourage carriers to be more rigorous in *their* collection of the charges. This, the agency maintained, would enhance the general regulatory effect of the demurrage system.[41]

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entitled to the entire demurrage charge even though this sum may far exceed any costs incurred. In addition, there is no indication that this demurrage revenue is presently being used by the delivering road to purchase additional cars. This money is, therefore, a bonus to a carrier who has no interest in whether or not a car is being detained. However, the car owner, whether private or foreign road, has its equipment detained and unavailable for further use, and thereby loses revenue. This is especially true of private car owners who do not receive per diem but a mileage allowance. This remitted amount which table 5 shows is approximately $22 for each excess day ($11 if it is assumed that Service Order No. 1124 inflated demurrage by 50 percent), which SP estimates to be approximately $62.50 a car annually, will be an added dividend to car owners. When these figures are multiplied by the vast number of cars in the transportation system, the rule will certainly have a significant positive impact on car supply.

Id.

[41] 349 ICC at 435-36. The ICC elaborated as follows:

The shipper to whom the carrier delivers a car pays the demurrage. He has control of the car and determines how long he will hold it. One of the factors he will consider in deciding how long to detain a car is the amount of the demurrage charges.

This proposal does not alter the level of demurrage charges. It merely shifts the payment of part of these charges from one

Further, the ICC carefully weighed the benefits of the proposed rule against the claims of its opponents that demurrage remittance, by reducing railroad revenues and requiring additional administrative expenses, would place undue economic burdens upon many carriers.[42] The ICC

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group, the receiving carrier, to another, the car owner. Since it can make no difference to the shipper whether he pays the charge to one party rather than another, it may appear that the implementation of this proposal would have no impact on car utilization.

However, evidence collected by the Commission staff in another proceeding suggests that this proposal may have a positive impact on car utilization. The Commission has issued a Notice of Proposed Rulemaking and Order in Ex Parte No. 285, *Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail Common Carriers of Property*. In that notice and order, served August 16, 1972, we indicated that inquiries by the Commission's field staff revealed that large sums of money resulting from demurrage charges remained uncollected by the carriers or that such debts were canceled because carriers did not maintain adequate records. Other indications that carriers do not always collect demurrage charges appear in *Demurrage Rules and Charges, Nationwide*, 340 I.C.C. 83, 92 (1971), and *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 233 (1970).

When carriers do not actually collect demurrage charges, an important economic incentive for shippers to release cars with dispatch is lost. Under the proposal herein, the car owner would receive part of these demurrage payments. Faced with the necessity of paying these sums to the car owner, the delivering carrier would have added motivation to pursue the charges against the shippers and receivers. The incentive to release cars would be greater and some improvement in car utilization could reasonably be expected.

Id.

[42] The short-line railroads, in particular, have expressed their strong concern about the possible detrimental impact of the remittance scheme upon their operations. Their claims, whether legitimate or not, are not determinative. Rather, they are but one of several considerations relevant to ascertaining the rationality of

found that many of the projections set forth by the objecting carriers were based on short-term start-up expenses, and therefore were subject to question. Thus, the agency concluded that the benefits of the proposed rule outweighed the burdens.[43] Having reviewed the ICC's reasoning, we are

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the ICC's rule. As a unanimous Supreme Court reasoned in a proceeding quite similar to the present one:

> It may be conceded that the immediate effect of the Commission's order will be to disrupt some established practices . . . , and on occasion to cause serious inconvenience . . . If the Commission were thrusting these regulations upon an admittedly smoothly functioning transportation industry . . . the rationality of its action might well be open to question. But such is not the case.

United States v. Allegheny-Ludlum Steel, 406 U.S. at 753, 92 S.Ct. at 1948 (upholding car service rules requiring the return of freight cars in the direction of the lines of the railroads owning the cars).

[43] 353 ICC 589-91. The ICC declared in its final report:

> In conclusion, we realize that the cost data submitted by many of the reporting roads is inflated and that many of the expenses are unsubstantiated. (For example, a carrier states that it needs four additional employees but it does not indicate how it arrived at this figure.) However, despite our reservations as to the accuracy of the cost data presented, even taking it at face value, we are nevertheless unable to find that the costs of administering the rule are excessive. As can be seen from table 4, average startup expenses of $14,219 and annual expenses of approximately $0.90 for each excess demurrage day are not unreasonable, unjustifiable, or unduly burdensome. Even if expenses were slightly higher, the evidence of record still supports the finding that the costs of administering the rule are not prohibitive.
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> The record also indicates that in terms of cost-benefit, the proposed rule is justified. Table 5 shows that the total amount of demurrage that would have been remitted for the period July 1 through December 31, 1973, to private and foreign car owners by 42 roads is $40,387,455. Even if we discount the effects of Service Order No. 1124, which inflated this figure by an estimated 50 percent, $20,193,727 would still have been remitted to car owners during this 6-month period. This discounted amount would constitute between a $10 and $11 return on a car owner's investment for each excess demurrage delay. When this amount is compared to the costs of administering the rule, it becomes evident that the costs are not so burdensome as to outweigh the rules's benefit in providing an incentive for the purchase of additional equipment and, thereby, in increasing car supply.

Id. at 590-91.

unable to say that the agency's solution is not "rationally supported."[44]

C.

Petitioners further contend that the ICC's order in Ex Parte No. 289 must be set aside for failure to comply with certain procedural requirements of the APA, 5 U.S.C.A. § 553(c) (1977), and of the ICA, 49 U.S.C.A. § 17(14)(b) (Supp. 1978).

1.

Section 553(c) provides in pertinent part that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise and general statement of their basis and purpose." It is the petitioners' position that this section requires that the statement by the agency be supported by more than conclusory assertions, and that the ICC remittance rule is invalid because of the agency's failure to comply with this requirement.

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[44] In light of the ICC's extensive discussion of the benefits and burdens of the demurrage remittance rule, we are also unable to accept petitioners' contention that the agency has failed to provide this Court with a basis for determining whether the proposed rule comports with the National Transportation Policy, 49 U.S.C.A. prec. § 1 (Supp.1978). *See generally A. L. Mechling Barge Lines, Inc. v. United States*, 376 U.S. 375, 84 S.Ct. 874, 11 L.Ed.2d 788 (1964); *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 78 S.Ct. 173, 2 L.Ed.2d 117 (1957).

Those courts which have considered the issue agree that § 553(c) is designed to facilitate meaningful judicial review of agency action.[45] When engaging in such review, courts have expressed their intention to limit their scrutiny to the actual reasoning set forth by the agency.[46] Thus, *post hoc* rationalizations advanced in the course of judicial review have been considered insufficient bases for sustaining an administrative action.[47]

However, in recognition of the limited purpose of the statement requirement of § 553(c), the provision has not been seen as a vehicle for searching judicial oversight of agency decision-making.[48] As the District of Columbia Court of Appeals made clear in *Tabor v. Joint Board for Enrollment of Actuaries*, the mere failure to publish the statement of the rule's basis and purpose at the same moment as the regulations are published does not constitute a violation of § 553(c).[49] Rather, "[t]he enquiry must be

[45] *See, e. g., Tabor v. Joint Bd. for Enrollment of Actuaries*, 185 U.S.App.D.C. 40, 44-47, 566 F.2d 705, 709-12 (1977); *Alabama Ass'n of Ins. Agents v. Board of Governors of the Fed. Reserve Sys.*, 533 F.2d 224 (5th Cir. 1976), *amended*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978); *National Nutritional Foods Assoc'n v. Weinberger*, 512 F.2d at 701. *See generally* Pederson, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38, 73-4 (1975); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 Harv.L.Rev. 782 (1974). *See also Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *American Iron & Steel Inst. v. EPA*, 568 F.2d at 296-7; *Dry Colors Mfrs. Ass'n Inc. v. Department of Labor*, 486 F.2d 98, 104 n. 8 (3d Cir. 1973).

[46] *See Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d at 710.

[47] *Id.*

[48] *Id.*

[49] 566 F.2d at 711.

whether the rules and statement are published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes the rules." [50]

In the present situation, the ICC's notices in the *Federal Register* of the proposed further rulemaking and of the final rule themselves satisfy the requirement of § 553(c).[51] In addition, there can be little doubt that the ICC Interim Report as well as its final Report and Order more than fulfill the statutory purpose of facilitating judicial review.[52]

2.

The contention of petitioners regarding the time requirements set forth in the ICA, 49 U.S.C.A. § 17(14)(b) (Supp. 1978), presents a more difficult problem. That section provides: "*Within one year after February 5, 1976,* [the date of the enactment of this subdivision] the Commission shall conclude or terminate, with administrative finality, any *formal investigative proceeding* with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been *pending before the Commission for a period of three or more years* following the date of the order which instituted such proceeding." [53]

Petitioners argue that the proceeding here was a "formal investigative proceeding", that it was pending before the ICC for a period of more than three years subsequent to the initiation of the proceeding, and that it continued

[50] *Id.* at n. 14.

[51] *See* 40 Fed.Reg. 18797 (1975); 42 Fed.Reg. 19146 (1977).

[52] The Supreme Court has previously found a "comprehensive" ICC report to "fully comply" with the requirement of § 553(c). *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. at 747, 758, 92 S.Ct. 1941, 32 L.Ed.2d 453.

[53] 49 U.S.C.A. § 17(14)(b) (Supp.1978) (emphasis added).

for more than one year after the enactment of § 17(14)(b). They maintain that the appropriate sanction for such a violation of the section is the setting aside or dismissal of the proceeding. Respondents, on the other hand, answer that the proceeding here was an informal one; that the ICC's Notice of Proposed Further and Amended Rulemaking and Order initiated a proceeding that was separate from that instituted in 1972 by the ICC's initial notice in Ex Parte No. 289; and thus that the time limitations were not transgressed. In any event, they insist that dismissal is neither required nor appropriate.

Recent opinions of several courts of appeals have consistently distinguished between "informal rulemaking" under the APA, 5 U.S.C.A. § 553 (1977), which need not be conducted with the procedural formalities of a trial, and "formal rulemaking" under 5 U.S.C.A. §§ 556 and 557 (1977), which is required to have an evidentiary hearing.[54] There is no disagreement among the parties here that Ex Parte No. 289 comes within the former category, that of "informal rulemaking." Respondents seek to establish that, —because the proceeding in question is "informal" for purposes of the APA, it is also "informal" for purposes of the ICA, 49 U.S.C.A. § 17(14)(b) (Supp. 1978).

We disagree. The ICC offers no evidence or reasoning to support the assertion that Congress, when drafting § 303 of the 4R Act, which amended the procedural requirements of the *ICA*, had in mind the characterization that several courts have given to notice and comment rulemaking under the *APA*, 5 U.S.C.A. § 553. In the absence of any evidence, such a congruence seems to us implausible. While the purpose of the APA is to establish general procedural

[54] *See, e. g., National Ass'n of Food Chains, Inc. v. ICC*, 175 U.S.App.D.C. 346, 351, 535 F.2d 1308, 1313 (1976); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 170 (6th Cir. 1973); *Phillips Petroleum Co. v. FPC*, 475 F.2d 842, 851 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 901, 39 L.Ed.2d 102 (1974).

guidelines for a broad range of administrative agencies,[55] the ICA applies to a much narrower set of circumstances. Thus, it is reasonable to believe that Congress, when drafting the 4R Act amendments to the ICA, was thinking in terms of the particular problems of the ICC and the railroad industry.[56]

Indeed, such an interpretation of congressional intent is affirmatively supported by the available legislative history of § 17(14)(b). Paragraph (14)(b) was added to § 17 of the ICA in 1976, as part of Congress' broad attempt in the 4R Act to expedite ICC procedures. Congress was particularly concerned with the lengthy delays traditionally accompanying railroad-related matters. Thus, in § 303(a) of the 4R Act, 49 U.S.C.A. § 17 (Supp.1978), deadlines were established by Congress for the completion of evidentiary proceedings by ICC sub-units, the submission of initial reports to the full ICC, and the consideration and final disposition of administrative appeals. Furthermore, in § 303(b) of the 4R Act, Congress established deadlines for the disposition of "any formal investigative proceeding with respect to a common carrier by railroad." We are unable to find any indication, either on the face of the 4R Act or in the legislative history, that Congress intended proceedings such as Ex Parte No. 289 to be exempt from a statutory time requirement.[57]

[55] *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950).

[56] This is evident from the text of the 4R Act itself. *See* Pub.L. No.94-210, 90 Stat. 31 (1976).

[57] Indeed, that Congress intended § 17(14) to be applied broadly is indicated by the congressional comments, although few in number, that were made during the drafting of the section. *See, e. g.*, Final Conference Report, S.Rep.No.595 and H.R.Rep.No.781, 94th Cong., 2d Sess. 162, U.S.Code Cong. & Admin.News 1976, p. 177: "The conference substitute follows the House bill except that it incorporates the Senate provision that . . . all proceedings insti-

It is not without significance that the ICC, in its annual reports to Congress, has consistently designated notice and comment rulemaking proceedings such as the present one as "formal proceedings".[58] In contrast, informal proceedings have included such ICC activities as applications for temporary authority to operate a motor vehicle, applications to deviate from regular routes, and applications for temporary authority to lease or control. It is most likely that it was this categorization of proceedings that Congress had in mind when drafting § 17(14)(b).

Consequently, we hold that Ex Parte No. 289 constituted a "formal investigative proceeding" under the ICA, 49 U.S.C.A. § 17(14)(b), and that the statute's time requirements are therefore applicable.[59]

Nevertheless, we do not believe that the ICC's failure in this case to comply with the statutory deadline requires us to dismiss the proceedings. Section 17(14)(b), applying to proceedings initiated prior to the enactment of that section, contains no express sanction for noncompliance as does § 17(14)(a), which pertains to ICC investigations begun since the provision's enactment.[60] This distinction

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tuted by the Commission shall be concluded with administrative finality, within 3 years after such proceeding was initiated."

[58] *See, e. g.*, 91 ICC Ann.Rep. 111 (1978); 89 ICC Ann.Rep. 101-2 (1976).

[59] We decline to accept the ICC's contention that Ex Parte No. 289 was actually two proceedings. The ICC claims that the April 1975 Notice of Proposed Further and Amended Rulemaking began a new rulemaking proceeding which merely capitalized on the efforts of the earlier activity. In light of the ICC's own language in the Interim Report and the April 1975 notice to the effect that the reopening was simply a continuation of the earlier proceeding, we find the ICC's argument before us to be unconvincing.

[60] 49 U.S.C.A. § 17(14)(a) (Supp.1978) provides: "Any formal investigative proceeding with respect to a common carrier by railroad which is instituted by the Commission after February 5, 1976, shall be concluded by the Commission with administrative finality within 3 years after the date on which such proceeding is instituted. Any such proceeding which is not so concluded by such date shall automatically be dismissed."

in the language of the two sections indicates a desire on the part of Congress not to place ongoing proceedings under the same absolute time limit as proceedings instituted subsequent to the enactment of the 4R Act.

Furthermore, we are unconvinced that, as an equitable matter, injunctive relief barring enforcement of the ICC's order would be at all appropriate in this instance. While § 17(14)(b) evidences a congressional desire to eliminate delay in ongoing ICC proceedings, this purpose is but one of several that animated the 4R Act. Accordingly, it is necessary to balance the congressional aim of eliminating delay against the equally strong goals of revitalizing the nation's railroad system and alleviating the boxcar shortage. In light of these competing purposes, and of the vast resources that have obviously been expended in the course of Ex Parte No. 289, to enjoin the proceeding at this juncture would appear to be inappropriate. Furthermore, petitioners have failed to offer any evidence that they have been unduly prejudiced by the additional delay of two months beyond the statutory limit.[61]

We therefore hold that, while the ICC has exceeded the time limitations established by § 17(14)(b), dismissal here is neither required nor warranted.

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[61] Obviously, such a demonstration of prejudice would have been particularly difficult for petitioners to make, since the two-month delay beyond the statutory limit merely served to further postpone the eventual enforcement of the order to which they object.

D.

Petitioners' final claim is that the ICC rule, by including private car owners in the demurrage remittance scheme,[62] permits the payment of unlawful rebates in violation of 49 U.S.C. §§ 15(15) [63] and 41(1).[64] It is contended that these sections will be violated by the order, since the payment by a railroad for the use of a private freight car will exceed the owner-shipper's cost of furnishing the car, and since the receiving carrier will in effect be paying an allowance which will not be published in its tariffs for the use of a car.

We have given careful consideration to these arguments and conclude that petitioners have misconstrued the purposes of § 15(15) and § 41(1), as well as the concept of demurrage. Sections 15(15) and 41(1) were designed to ensure reasonable and nondiscriminatory rates and charges, and to prevent any type of departure from published trans-

[62] In its final Report and Order, the ICC reasoned that: "An increasing percentage of the Nation's carrier fleet is owned by private interests. The evidence shows that between 1972 and 1974 private car owners and shippers added 35,711 cars to the transportation system. These investors should receive a fair return on their investment as well as carriers." 353 I.C.C. at 594.

[63] 49 U.S.C.A. § 15(15) (Supp.1978) provides: "If the owner of property transported . . . directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs . . . and shall be no more than is just and reasonable and the Commission may . . . determine what is a reasonable charge as the maximum to be paid . . . ."

[64] 49 U.S.C.A. § 41(1) (Supp.1978) makes it unlawful "to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property . . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier . . . or whereby any other advantage is given or discrimination is practiced."

portation rates.[65] In contrast, the essential nature of demurrage is that of a car service regulation.[66] Consequently, we do not believe that a demurrage charge can properly be understood as a "rate" under § 41(1), or as a "charge" as that term is used in § 15(15). Unlike the use of the terms in those provisions,[67] demurrage remittance relates not to rail carriers' property, but to excessive delay caused by the shipper or receiver in the loading or unloading of freight cars. Furthermore, it is neither a "charge and allowance" paid by the railroads for use of freight cars nor a reduction of the railroads' rates for owner-shippers. Rather, demurrage is a cost imposed upon the receiver, the penalty portion of which will be transmitted to the owner by the delivering carrier.

As Judge Prettyman observed in his oft-quoted opinion in *Iversen v. United States:* [68]

> [D]emurrage charges are in part compensation and in part penalty; . . . in full character they are neither, *not being rates as that term is used in connection with rate-making,* nor penalties as that term is used in respect to penal impositions. They are *sui generis.* Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and

[65] *See United States v. Braverman,* 373 U.S. 405, 406, 83 S.Ct. 1370, 10 L.Ed.2d 444 (1963) (unanimous); *El Dorado Oil Works v. United States,* 328 U.S. 12, 66 S.Ct. 843, 90 L.Ed. 1053 (1945).

[66] *See ICC v. Oregon Pac. Indus., Inc.,* 420 U.S. 184, 190, S.Ct. 909, 43 L.Ed.2d 121 (1975) (unanimous).

[67] *See* notes 64 and 65 *supra.*

[68] 63 F.Supp. 1001 (D.D.C.1946), aff'd mem., 327 U.S. 767, 66 S.Ct. 825, 90 L.Ed. 998 (1946).

regulations. They *could not have been sustained as carrier charges* or as penalties.[69]

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[69] *Id.* at 1005, *cited with approval in ICC v. Oregon Pac. Indus., Inc.*, 420 U.S. at 190 n. 7, 95 S.Ct. 909, 913 (emphasis added). In reaching this conclusion, Judge Prettyman relied in part on the opinion of the Virginia Supreme Court of Appeals in *Norfolk & W. R. Co. v. Adams, Clement & Co.*, 90 Va. 393, 18 S.E. 673 (1894). His discussion of that case is of particular relevance to the present proceeding:

> In 1894 the Virginia Supreme Court of Appeals considered the validity of a demurrage charge in view of a state statute which forbade a railroad to charge any fee or commission "other than the regular transportation fees, storage, and other charges authorized by law." The official report of the matter says:
>
> "The company had made a rule, of which plaintiffs had notice, that a charge of $1 per car per day would be made for every detention of a car for the purpose of loading or unloading beyond seventy-two hours from the time that the car was placed at the disposal of the shipper or consignees, as the case might be."
>
> The court said:
>
> "It [the demurrage charge] is neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the rates prescribed."
>
> The court sustained the charge on the ground that after allowance of a reasonable time for unloading, the railroad "can make reasonable rules and regulations and charges for such service as bailee, as it may see fit," and said, "Such charges are not carrier charges in the meaning, intendment, or prescription of the statute."
>
> Thus, the original support for the right of a railroad to impose a demurrage charge was that such charge constituted a reasonable rule and regulation in respect to the use of the car, the purpose being to prevent delay in loading and unloading.

Iversen v. United States, 63 F.Supp. at 1003-4.

As a result, we are unable to say that the inclusion of private car owners in the ICC's demurrage remittance order is a violation of the ICA.

III.

For the reasons herein set forth, the petition to set aside the order of the ICC in Ex Parte No. 289 will be denied.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

(EX PARTE NO. 289)

Nos. 77-1714 and 77-1732

Present: ADAMS, WEIS and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the Interstate Commerce Commission and were argued by counsel on July 25, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review from the order of the said Interstate Commerce Commission are hereby denied and the order of the said Commission filed April 7, 1977, be and hereby is affirmed. Costs taxed against petitioners.

ATTEST:

/s/ M. ELIZABETH FERGUSON
M. Elizabeth Ferguson
Acting Clerk

September 6, 1978

APPENDIX C

Served April 7, 1977

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

Decided March 18, 1977

Upon investigation, proposed regulation requiring remittance to the freight car owner by a nonowning railroad, on whose lines a car is being detained under demurrage, of all demurrage charges collected in excess of $10 per car per day, modified in certain respects, and adopted. Appropriate order entered.

Curtis H. Berg, W. Donald Boe, Jr., and *William R. Power* for carrier proponents.

C. W. Bath, Oliver Callson, T. A. Ellaby, James F. Fox, H. Richard George, James J. Irlandi, James E. Isbell, Jr., A. E. Leitherer, J. W. McDermond, Thomas F. McFarland, Jr., Robert P. Post, Jon R. Roy, Larry G. Smethers, Harold E. Spencer, A. T. Walter and *George William Wright* for private car owner or lessee proponents.

Robert C. Binn, Emried D. Cole, Jr., Donald E. Cross, Robert S. Davis, Samuel P. Delisi, Thomas C. Dorsey, Louis T. Duerinck, Richard S. M. Emrich III, James L. Howe III, Peter J. Hunter, Jr., Harvey Huston, C. H. Johns, Howard D. Koontz, Albert W. Laisy, Richard D. Lalane, Patrick McEligot, Richard J .Murphy, Joseph J.

Nagle, R. R. Pumphrey, T. J. Siegel, John McDonald Smith, T. M. von Sprecken, Jr., R. H. Stahlheber, Sidney Weinberg, and *Kinga M. LaChapelle* for carrier opponents.

Barry Chasnoff, John Hart Ely, and *William A. Kutzke* for United States Department of Transportation, opponent.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING

O'NEAL, *Commissioner:*

This proceeding was instituted by notice of proposed rulemaking and order of October 12, 1972. (Notice was published in the Federal Register on October 26, 1972, Vol. 37, p. 22884.) Therein, adoption of a proposed rule was set forth for consideration. The proposed rule would require that: "The non-owning railroad on whose line a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day." All common carriers of property by railroad subject to the Interstate Commerce Act (the act) were made respondents. They along with all other interested parties were invited to submit written statements of facts and arguments. In response to these representations an interim report of the Commission (349 I.C.C. 411), entered March 28, 1975, and served April 25, 1975, was issued. In the interim report, certain procedural matters were initially resolved. We held that the Commission had jurisdiction to allocate demurrage revenues under sections 1(11), 1(14)(a), and 1(15), and that no oral hearing was required in this proceeding. Also, in discussing the merits of the proposed rule, we concluded in the interim report that its adoption was warranted in principle. Car utilization would be improved and the greater return on the car owner's investment, which would result from our adoption of the proposed rule, would increase the incentive to invest in freight cars and thereby improve car supply. We

also determined that private car owner participation in the rule was also supported by these same principles of car utilization and supply. However, because of the lack of evidence on the cost and administrative aspects of the rule, the proceeding was reopened for the receipt of further evidence on its feasibility and implementation. Participants were asked to submit specific information concerning present demurrage records and the modification and additional expenses which would be incurred by the implementation of the proposed rule. Nineteen guideline questions were provided to aid participants in the presentation of the requested material. The notice of amended rulemaking proceeding was published in the Federal Register, April 30, 1975 (Vol. 40, No. 84, p. 18797).

One hundred and eighteen parties including 101 rail carriers or carrier organizations submitted evidence on the merits, feasibility, and implementation of the rule. Twenty-six [1] initial and thirteen reply statements were filed. Most carriers submitted their information through the Association of American Railroads or the American Short Line Railroad Association, A few other parties consolidated their views.

As in the interim report, we will group participants according to their major viewpoints. They are (1) carrier

[1] Petitions for leave to intervene filed by Duval Sales Corporation, Evans Products Company, and International Minerals and Chemical Corporation jointly, and Pullman Transport Leasing Company separately, were granted by orders entered September 24, 1975. The petition for leave to intervene filed by FMC Corporation was granted by order entered November 28, 1975. By order entered August 10, 1976, the initial statements of the Delaware and Hudson Railway Co. (D&H) and the Detroit Terminal Railroad Company were striken for failure to serve a copy of these statements on all parties of record. D&H's statement was subsequently admitted by order entered March 11, 1977.

proponents,[2] (2) private car proponents,[3] and (3) proponents who consist mainly of carrier and carrier organizations.[4]

All evidence and arguments not mentioned have been considered and given due weight. Discussion of many of the various examples given in support of argument has been omitted since its inclusion would unduly lengthen this report. Similar arguments of the various participants will be discussed together to simplify discussion of the various positions.

Before discussing the merits, costs, and feasibility of the implementation of the proposed rule, we will consider what effect, if any, the amendment of section 1(16) of the

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[2] Burlington Northern, Inc., and Union Pacific Railroad Company.

[3] Archer Daniels Midland Company; Allied Mills, Inc.; Bay State Milling Company; Cargill, Incorporated; Duval Sales Corporation; Evans Products Company; FMC Corporation; Garvey, Inc.; General American Transportation Company; General Mills; Hercules, Incorporated; International Minerals and Chemical Corporation; International Multifoods Corporation; Peavey Company; The Pillsbury Company; Pullman Transport Leasing Company; and Swift Edible Oil Company and Swift Fresh Meats Company —Division of Swift and Company.

[4] American Short Line Railroad Association; Association of American Railroads; Robert W. Meserve and Benjamin H. Lacy, Trustees of Property of Boston and Maine Corporation, Debtor; Cedar Rapids and Iowa City Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Elgin, Joilet and Eastern Railway Company; Florida East Coast Railway Company; Illinois Central Gulf Railroad Company; Robert C. Haldeman, Trustee of Property of Lehigh Valley Railroad Company; Louisville and Nashville Railroad Company; Mississippi Export Railroad Company; Norfolk and Western Railway Company; Robert W. Blanchette, Richard C. Bond, John H. McArthur, Trustees of Property of Penn Central Transportation Company, Debtor (now a part of ConRail); and Delaware and Hudson Railway Company.

Interstate Commerce Act by the Railroad Revitalization and Regulatory Reform Act of 1976 (4RA) has on the Commission's jurisdiction in this proceeding. Except for the jurisdictional issue, we will set out our discussion and conclusions of the participants' contentions after the presentation of all the arguments and evidence.

Jurisdiction

Jurisdiction.—Section 1(6) was amended by the 4RA as follows:

> Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

By order dated February 27, 1976, the Commission noted that the amendment of section 1(6) appeared consistent with the announced purposes of this proceeding, and solicited comments on the effect of the amendment. Eighteen statements in response were submitted.[5]

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[5] American Short Line Railroad Association; Archer Daniels Midland Company; Association of American Railroads; Bay State Milling Company; Burlington Northern, Inc.; Cedar Rapids and Iowa City Railway Company; Duval Sales Corporation; Evans Products Company; Exxon Company, U.S.A.; Farmland Industries, Inc.; Florida East Coast Railway Company; FMC Corporation; General Mills; Grain Divisions/Cook Industries; International Minerals and Chemical Corporation; International Multifoods Corporation; Mississippi Export Railroad Company; Missouri Pacific Railroad Company; Peavey Company; Penn Central Transportation Company; The Pillsbury Company; Pullman Transport Leasing Company; U.S. Department of Transportation; and the Union Pacific Railroad Company.

The parties principally discuss whether the recent amendment conferred, confirmed, or refuted the Commission's jurisdiction to establish the proposed rules. Carrier opponents generally argue that the Commission did not have jurisdiction before section 1(6) was amended and that jurisdiction was not conferred by the recent amendment. Counter arguments by carrier and private car owner proponents, however, state that the amendment confirms the Commission's authority to promulgate the proposed rule.

Carrier opponents.—Opponents to the rule argue that the stated purposes of the amendment are defeated by the proposed remittance scheme, which is said to be governed by principles of equity, not of car utilization and distribution, or of an adequate supply. They argue that no evidence has been presented to establish that the proposal will cause car owners to purchase additional, or shippers to release equipment expeditiously. In fact, the rule is argued to have the opposite effect since nonowning carriers will have less motivation to collect demurrage charges for the reason that they will be remitting the excess amount to car owners; and shippers detaining their own equipment, it is further argued, will have less incentive to release cars quickly because demurrage in excess of $10 will be remitted to them. (Further elaboration of these points will be given in the discussion of car utilization infra.) It is also contended that since the amendment merely authorizes the Commission to regulate the "level" of demurrage charges, it does not confer power to divide the charges—as is being done in this processding.

Still another argument is that the Commission is trying to combine unlawfully the two powers conferred by the amendments to sections 1(6) and 1(14)(a) of the act; the power to compensate an owner for the use of its cars and

the power to regulate the use of cars.[6] Section 1(14)(a) of the act was amended to encourage the purchase, acquisition, and efficient utilization of freight cars. In estab-

[6] Sec. 1(14)(a):

(14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rate, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

lishing rules and regulations (after oral hearing) for the compensation to be paid a car owner, the Commission was directed to consider whether there is just and reasonable compensation to the owner, and whether it will contribute to sound car practices and encourage the acquisition and maintenance of car supply. This, it is argued, has not been done in this proceeding. Therefore, the Commission has no jurisdiction under section 1(14)(a), and cannot combine this section's compensatory element with the demurrage provisions of section 1(6).

Private car and carrier proponents.—Proponents, on the other hand, contend that the legislative history of the amendment to section 1(6) supports the Commission's jurisdiction. In this regard, it is pointed out that the House Committee and Senate Report indicates that section 1(6), as amended, "requires the Commission to establish rules and regulations for the computation of demurrage charges so that freight car utilization is maximized and car owners receive adequate compensation." Final Conference Report, S. Rep. 94-595 and H.R. 94-781, 94th Cong., 2d Sess. 135 (1976). In addition, proponents contend that the "national needs" for maintenance of an adequate freight car supply are not being met under the traditional demurrage system because lines which do not invest in cars are being rewarded at the expense of actual investors. However, if demurrage charges are paid in part to car owners, such charges will increase the car owner's return on its investment and will thereby be an added incentive to purchase additional cars. This proponents stress, will help maintain an adequate freight car supply.

The U.S. Department of Transportation (DOT) contends that one of the goals of Congress in enacting the 4RA was to encourage the purchase, availability, and efficient utilization of cars. This is reflected in the amendments to section 1(6) and 1(14) of the act, which the DOT argues, requires a complete reassessment by the Commis-

sion of all rules governing freight car acquisition, maintenance, distribution and utilization. It is submitted that this proceeding is too narrow and does not adequately deal with these concerns. Proponents, therefore, recommend that this proceeding be suspended and a broad investigation of the best methods to assure sufficient availability and utilization of freight cars be instituted.[7]

Conclusions.—The legislative history of the amendment to section 1(6) of the act and the wording of the section itself establishes the Commission's jurisdiction to remit excess demurrage charges to car owners to provide them with adequate compensation for the use of their cars. The Joint Explanatory Statement of the Committee of Conference, Report 94-768, p. 128, 94th Cong., 1st Sess. (1975), states that:

> The house Amendment requires that rules and regulations be established for the computation of demurrage charges so that freight car utilization was maximized.
>
> Conference Substitute
>
> The conference substitute follows the House amendment, but insures the Commission will consider the transportation use [sic] the car and provide a fair return on investment in freight cars.

Further evidence is presented that the legislature indicated that charges contain a compensatory element. In the Joint Explanatory Statements of the Committee of Conference, Report 94-781, p. 142, 94th Cong., 2d Sess. (1976),

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[7] The Union Pacific Railroad Company filed a response to the DOT's statement, referring to it as a motion to suspend the instant proceeding. The statement is in the form of a recommendation, is not separately titled as a motion, and, therefore, will not be conidered as a motion but as a request or recommendation.

two different breakdowns for sections 1(6) and 1(14)(a) indicate that demurrage charges can be used to compensate owners of cars as well as per diem charges. The report states that the proposed legislation:

> (13 requires the Commission to establish rules and regulations for the computation of demurrage charges so that freight car utilization is maximized and car owners receive adequate compensation;
>
> (14) reforms existing law with respect to compensation when one carrier pays for the use of a freight car owned by another carrier; * * *

Specific mention of this proceeding is also made in the Report of the Committee on Interstate and Foreign Commerce, Report No. 94-725, p. 241, 94th Cong., 1st Sess. (1975). In discussing the Commission's continuing activities in the area of demurrage, it stated that:

> The purposes of the proposals are to create an added incentive for the car owner to acquire additional cars and remove any inducement to the nonowner to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

Thus, the legislative history of section 1(6) clearly indicates that the Commission is not restricted to section 1(14)(a) of the act in providing an incentive for car owners to acquire additional cars. The amendment provides another basis of jurisdiction in addition to the Commission's car service authority discussed in the interim report (349 I.C.C. 411.415). Freight car supply will be fostered under the rule as investors receive a greater return on their investment, which will be an added incentive for the purchase of additional cars. As more fully elaborated in the Discussion and Conclusions hereinafter, the proposed rule clearly will fulfill the purposes of section 1(6) by meeting the Nation's needs for the maintenance of an

adequate freight car supply. Therefore, we find that the Commission has jurisdiction to promulgate the proposed rule.

In regard to the request of the DOT to suspend this proceeding in favor of a broader investigation, any further delay in the ultimate determination of this proceeding would only complicate and postpone the Commission's efforts to alleviate car shortages. The request will, therefore, be denied.

Administrative Costs of Implementation

Private car and carrier proponents.—Carrier and private car proponents argue that the railroads presently require sufficient recordkeeping data to institute the proposed new demurrage remittance scheme with minimal expense. Proponents point out that railroads presently keep accurate demurrage records showing car ownership and number, constructive placement date, actual placement date, date of release, amount of demurrage, et cetera. Accordingly, they conclude that the only additional burden that will be placed on the delivering road is the computation of the arbitrary or excess demurrage charges.

Some private car proponents feel that opponents to the rule have exaggerated the administrative startup and annual costs of the remittance to include installation of new computer systems and other extraneous expenses which would be incurred even without the adoption of the rule. They argue that railroads could use demurrage bureaus and other associations to handle the administrative and recordkeeping functions and provide the necessary auditing safeguards, which exist in the present system. Costs would, therefore, be minimized. No direct evidence of the costs of the proposed rule was provided by private car proponents, as this information was thought to be within the knowledge of the carriers.

It is also pointed out by private car proponents that the extension of the rule to private car owners will not result in excessive administrative costs. Tariffs presently provide for the payment of mileage allowances to private car owners on tank cars and nontank cars. Railroads also keep accurate records of the movement of private cars over their lines; data is gathered and consolidated; and payments are made on a "fleet" basis to the private car owners. Therefore, a framework for the proposed rule is said to exist already.

The two carrier proponents, the Burlington Northern (BN) and the Union Pacific Railroad Company (UP), submitted data on the costs of implementing the rule on an individual basis. They used the last 6 months of 1973 as their study period. They state that the present record-keeping system can provide the necessary information, although an expanded computer printout to display the required data would be needed by the BN and the UP would have to modify its average-agreement forms. Start-up expenses for BN would be $2,500, and for UP startup would be $1,950. Annual expenses thereafter would be $48,180 for the BN and $16,000 for the UP, for additional personnel.

Carrier opponents.—The Association of American Railroads (AAR) [8] estimates that the annual costs of administering the rule will range between $1.5 and $2 million. It submits an estimated startup and annual cost for 89 railroads which total approximately $500,000 for the former costs and over $1.5 million in annual administrative expenses. These additional costs are based on the projected need for additional employees (auditors, clerks, and supervisors), forms, travel, and computer expenses. Some of the carriers indicate that the methodology needed to implement the rule was used in preparing the cost data presented to the Commission. The following table shows the costs for 12 selected railroads (including the 2 carrier proponents, the UP and BN).

[8] The AAR represents all its members except the BN, UP, Denver & Rio Grande Western Railroad Company, and Pittsburgh & Lake Erie Railroad.

TABLE 1

Estimated startup and annual costs

Carrier	Startup	Annual
Atchison, Topeka & Santa Fe Railway Company	$ 4,350	$ 48,070
Burlington Northern, Inc.	2,500	48,180
Chicago and North Western Transportation Company	17,200	99,063
Chessie System	31,184	208,366
Florida East Coast Railway Company	500	10,000
Illinois Central Gulf Railroad Company	135,000	133,200
Missouri Pacific Railroad	7,484	80,834
Norfolk and Western Railway Company	6,500	110,954
Penn Central Transportation Company [1]	77,945	332,713
Southern Railway System Lines [2]	....	224,000
Southern Pacific Transportation Company	7,512	46,500
Union Pacific Railroad Company	1,950	16,000

[1] Now a part of ConRail.

[2] Costs without using a demurrage bureau.

Cost data was also presented by three demurrage bureaus. The bureaus believe that the costs of administering the rule would be lower if necessary accounting and auditing functions were done on a group basis as is presently done on a large portion of charges for demurrage, detention storage, and average agreements. While, additional expenses will still be incurred in implementing the rule (for personnel, forms, travel, and computer expenses), on

a group basis these costs will assertedly be less than if each railroad performed the functions individually. The foreseeable costs which would be prorated among the bureau members are estimated as follows:

TABLE 2

Costs of demurrage bureaus

Bureau	Startup	Annual
Pacific Car Demurrage Bureau (for 34 member railroads)	[1] $12,129	[2] $ 87,129
Southeastern Demurrage and Storage Bureau (for 58 member railroads)	15,032	208,392
Demurrage, Western Weighing and Inspection Bureau (for 91 member railroads)	....	397,464

[1] This represents costs for new forms which it appears would be used throughout the year, and, therefore, is not an accurate startup cost.

[2] The annual estimated cost will be $110,000 more if the bureau polices the rule where there are no regional bureaus certifying the amount.

Only three railroads, the Chessie System, Penn Central Transportation Company (PC) (now a part of ConRail), and Southern Pacific Transportation Company (SP), specifically indicate that their costs include the amounts to be paid the demurrage bureaus.[9] Therefore, it is unclear whether the costs submitted by the other individual railroads are costs which (1) would be incurred if the demurrage bureaus were not utilized, (2) would be incurred in addition to the costs reported by the demurrage bureaus, or (3) include individual costs and costs payable to the demurrage bureaus.

[9] The Pacific Car Demurrage Bureau, and nine Demurrage, Western Weighing and Inspection Bureau members' costs were their allocable portion of the demurrage bureau costs. The 21 members of the Southeastern Demurrage Bureau did not present individual prorated costs, only the total costs to the bureau of all its members.

To obtain an indication of the administrative costs if demurrage bureaus were utilized, we took the number of excess demurrage days presented by the Pacific Car Demurrage Bureau's members and divided that by the prorated costs to the members.[10] The startup and annual cost for each excess day is $0.035 and $0.2514 respectively.

The American Short Line Railroad Association (ASLRA), utilized cost data submitted by 46 member lines [11] to project the costs of administering the rule for its 214 member lines. The expenses based on a per-car-handled basis (which includes all revenue cars handled and not just arbitrary cars) are as follows:

[10] The bureau submitted the prorated costs to the individual roads so that we could compute the charges for each excess day. It was the only bureau to provide us with this breakdown. The startup cost is not totally accurate as it represents the cost of new forms which would be used throughout the year. The startup and annual costs per excess day represents the costs prorated over the annualized excess days.

[11] One member of the ASLRA study group is the Cedar Rapids and Iowa City Railway Company (CRANDIC) which also submitted data to the AAR. There could be other overlaps in the ASLRA's projection of costs to its total membership if demurrage bureaus have also submitted costs for the same road. However, from the evidence presented, we are unable to calculate the frequency of this double reporting. The ASLRA study group included 27 members in the eastern territory, 7 in the southern territory, 2 in the western territory, and 3 in the Mountain Pacific territory.

TABLE 3

Additional administrative expenses of rule for A.S.L.R.A. membership

Railroads	Total cars handled	Expenses per car	Total expenses
Class I Switching and Terminal	3,687,518	$0.035	$129,063
Class II Switching and Terminal	995,944	.081	80,671
Class I Line-haul	1,508,202	.0115	173,443
Class II Line-haul	1,703,935	.0115	195,953
Total	7,895,599	....	579,130

These figures are based on data submitted by the study group for the time and cost of preparing the administrative study (which was done on a manual basis). These costs do not include the auditing, claims, or overhead expenses associated with the proposed rule. ASLRA states that if these expenses were added to the above figures, the total expenses would be $1 million annually. It is argued that such an increase in administrative costs is a needless and unjustified waste of carrier revenues.

The rule can either be implemented by the reporting roads on a manual or computer basis, or the administrative functions could be turned over to demurrage bureaus or other carrier associations. Costs would vary accordingly. Assessments of individual implementation of the rule are provided by the Chicago, Milwaukee, and St. Paul and Pacific Railroad (CMSP) and the Chicago and North Western (CNW). Assessments of demurrage bureau implementation are provided by the Pacific Car Demurrage Bureau (PCDB) and Southeastern Demurrage Bureau (CFDSB).

[12] The expenses are based on averaged data from the first quarter of 1975 for the 46 roads in the ASlra's study group. These costs were projected to the entire membership by multiplying the number of cars handled in 1974 for each class and type.

The CMSP states that if the proposed rule were put into effect, it would have to develop an entirely new system for accumulating demurrage records. This would mean converting its present manual method into a computerized system. Such a changeover would entail new forms, converting present records into machine-processable records, and computer programming. After these initial startup programs (amounting to $142,800), CMSP also indicates it would incur $714,350 annually in administering the rule. This figure is based on the costs of 5 keypunch operators, 1.52 full-time computer programmers, 15 auditors and 3 supervisors. The startup and annual costs for CMSP for each excess demurrage day are $1.0893 and $5.4493, respectively.

The CNW indicates that it would implement the rule on a manual basis, as is presently done with its demurrage records. Employees would record the car initial and number, name of car owner, station accounting number and name, miscellaneous bill date and number, number of excess demurrage days, and amount of refund to car owner. It would also maintain a list of payments made at stations, which would be verified against billings. After verifications are made, cars would be drawn off listings and classified by car owners for payment. The startup and annual costs for each excess day are $0.1028 and $0.5921, respectively, for CNW.

The PCDB presently receives from its members a monthly copy of demurrage records covering all cars reported. These reports are reviewed for possible under- and overcharges, and claims are handled by the Bureau. Under the rule it would also determine the amounts due from other railroads and certify that the proper remittance was made between carrier member and other railroads. It anticipates that if the rule goes into effect, it would need six additional clerks to analyze each demurrage record for possible remittance to car owners, and

for further review if claims are presented and adjustments made. A separate filing and posting system would also be needed, a number of forms would have to be revised, and several new six-part forms printed to cover remittance and record of cars to car owners.

The SEDSB reviews records to determine charges exceeding the value of $10 per car per day, identify car owners, car initial and number, station, date of demurrage or detention bill, and amount due. On average agreements, it will require a complete restatement of all cars for industries which habitually delay cars. Under the proposed rule the excess amount will be identified as to the car owner, and auditors will review railroad accounts to determine if proper amounts are paid. Both the SEDSB and PCDB will assure the proper transfer of funds for railroads in other territories, with the understanding that similar bureaus in other territories will do the same. They state that otherwise the rule will be impossible to administer. AAR replies, based on the evidence presented in all the initial statements, that the annual cost for administering the rule is approximately $3.5 million dollars.

The following table is our summary of the costs of the proposed rule as alleged by respondents. It is based on data submitted by 42 roads for the period July 1 through December 31, 1973.

TABLE 4

Costs for implementing proposed rule

I. Startup expenses	
(1) Lowest startup expense (Sunset Ry.)	$6.00
(2) Highest startup expense (CMSP)	142,800.00
(3) Average startup expense	14,219.00
II. Annual expenses	
(1) Total annual expense for 41 roads	$2,768,740.00
(2) Annualized number of excess demurrage days	3,068,004.00
(3) Average cost per excess day	$0.9025

Replies.—In reply, proponents reiterate their views that the carrier opponents are exaggerating the costs of the program. BN states that if only 25 percent of its demurrage revenues were remitted, the administrative expenses would only amount to 4.23 percent of the total demurrage charges. Private car owners, Duval Sales Corporation, Evans Products Company, International Minerals & Chemical Corporation (Duval), state that for 19 selected railroads the cost to remit the excess charges to private car owners for the period July 1 through December 31, 1973, is $134,376. When this is divided by the number of penalty demurrage days (184,950), the cost is 73 cents a day. Since the cost of administering the present demurrage program is $6 a day, the administrative cost is said to be more than adequately covered by the $10 to be retained by the delivering carrier.

ADEQUACY OF $10 MINIMUM

Private car and carrier proponents.—Private car and carrier proponents argue that the sum ($10) to be retained by the delivering carrier is adequate compensation to cover the administrative expenses of the rule, per diem, and the switching expenses associated with the delivery of the car.

Proponents state that the average per diem charge to be paid to owning railroads during periods of demurrage is approximately $4. Thus, the remaining $6 is arguably more than adequate to cover charges associated with the delivery of the car. They cite *Ormet Corp.* v. *Illinois Central R. Co.*, 341 I.C.C. 647 (1972), where the Commission held that in providing relief from penalty demurrage charges, the delivering railroad should retain $4 per car per day to offset per diem plus 20 percent thereof for administrative costs. This expense, it is noted, falls far short of the $10 to be retained by the delivering carrier under the proposed rule. Moreover, this is especially true

in cases where payments are made to private car owners since there are no per diem charges.

In cases where delivering carriers have shown per diem and switching charges in excess of $10, proponents note that it has not been established whether these costs are representative, or their percentage of the total number of cars involved. In addition, proponents contend that these costs should not be considered controlling in determining whether the $10 is adequate because the level of line-haul rates is set after considering per diem expenses and switching costs. Proponents state that it is a common practice to extend the line-haul car costs to include an average of 4 days at origin and 4 days at destination, citing "Rail Carload Cost Scales for 1973," ICC statement No. 1C1-73, p. 137. Proponents note that Rail Form A unit costs also include the added expenses incurred in switching cars to and from hold tracks. Therefore, proponents conclude, a carrier is compensated for its expenses by its division of freight rate, and if any cost adjustment is needed, it should be in the line-haul rate.

Carrier opponents.—Opponents state that generally cars which incur demurrage in excess of $10 a day are those which have been constructively placed on railroad-owned tracks. Additional switching is necessary for these cars when (a) the delivering road moves the car to a holding point, (b) cars held at these points are repositioned as other cars move in and out, and (c) actual delivery is made. Additional costs are also incurred for track and protective services.

Opponents note that each additional switch is an added expense for the delivering road in terms of actual switching costs and administrative expenses to record the position of the cars. For example, CMSP indicates 10 minutes of additional time is needed per switch—which costs $12.94. Such costs, carrier opponents maintain, will

not be covered by the $10 to be retained by the delivering road.

The Boston and Maine (B&M) submitted a study of daily conditions and locations of cars for July 1973, to illustrate that switching costs are not covered by the retained $10. Out of 1,091 cars handled, 638 were identifiable as having excess demurrage. On these cars there were 1,900 switching movements which would cost between $34.06 and $44.08 if they were intraplant or other than intraplant secondary movements, respectively. Based on these figures, the switching costs would be between $64,714 and $74,233. But if the proposed remittance were in effect, B&M indicates that $56,865 would have been remitted to the car owner and, consequently, the B&M would have suffered a loss of over $10,000.

The ASLRA also argues that per diem expenses are not met by the retained amount. It submits that class II railroads normally are not accorded per diem reclaim by connecting carriers. Although, in theory, the short lines' division of the fixed arbitrary and terminal lines per diem reclaim allowance makes the switching and terminal lines whole for their per diem responsibility on backhaul cars interchanged with the trunklines, in fact, according to ASLRA, this is not so. ASLRA states that "shortfalls" can occur (1) when the holding line assesses a local revenue charge on shipments; (2) when there is a high turnaround of relatively low per diem equipment and low turnaround of higher speed rated equipment (a further discussion of this point is contained in the section on average agreements); and (3) when there are changes in patron volume, detention times, or equipment value.

Taking the average of the ASLRA study group carriers (except those not within the normal range indicated by the average for other railroads), demurrage retained exceeds per diem by only 22 cents per car handled. Of the 25 class II line-haul short lines in its study, ASLRA states

that all but 2 would have net per diem costs exceed demurrage income by amounts ranging from 47 cents to $27.47. (See appendix A.) The statement presented by one of its members, the Meridian & Bigbee Railroad, submits that it presently collects in demurrage revenue only 15 percent of its per diem car costs on an annual basis. The proposed rule would, therefore, aggravate a presently critical situation.

Although opponents concede that demurrage is not considered a source of revenue, they argue that the money derived from demurrage is vital to offset additional operating costs which directly relate to the detention of equipment and car-hire costs during detention. Demurrage is also used to offset high-value equipment placed on assignment to delivering roads by car owners on which per diem rate exceeds the storage charge. The loss of this revenue, according to opponents, could force marginal lines into bankruptcy. Opponents conclude that the $10 to be retained by the delivering road is inadequate.

Replies.—Proponents reply that opponents of the rule have not established that, overall, the $10 to be retained by the delivering road is inadequate to meet costs.[13] However, in those limited instances where costs are not met by demurrage, it is maintained that the division of the line-haul rates should cover these costs.

Opponents continue to argue that costs incurred by the delivering railroad are not covered by the $10 portion of the demurrage charge. The ASLRA states that the minimum detention to the point of the first arbitrary day is 7 days. Thus, a carrier has 1 or more days of per diem before demurrage begins. Yet, no line-haul rate or division

[13] The Norfolk and Western Railway Company in its reply states that if remittance is ordered, then the $10 limit should not be altered to reflect added switching expenses as these are covered in the Rail Form A unit costs.

of rates contemplates covering costs for 7, 8, or 9 or more days of per diem responsibility before the assessment of demurrage for the first aribtrary days begins.

Average Agreements and Runaround Claims

There is some question whether average agreements would be difficult or impossible to utilize under the proposed rule. In an average agreement, a shipper offsets the early release of a car (credit) against a late release (debit). Excess debits are then billed at $10 and arbitraries (which cannot be offset by credits) are billed according to the different level of charges on a monthly basic without regard to car ownership.

Private car and carrier proponents.—Proponents foresee no problems with average agreements. They contend that data for determining charges is available from existing average agreement forms since the car initial, number, and date placed and released are specified. Remittance is not affected by "free" and $10 days, but only days in excess of $10, and, therefore, the rule would have no adverse effect on average agreements. The UP proposed the following method of computing charges under the average agreement: chargeable days for average agreement multiplied by $10 equals the amount chargeable at $10 a day. Then the amount chargeable at $10 a day is divided by the number of debit days per average agreement to equal the amount apportionable to each car owner per each debit day.

Carrier opponents.—Rail carrier opponents, on the other hand, state that if the proposed rule goes into effect, average agreements will have to be canceled. They argue that under an average agreement if each credit has a value of $10 in offsetting debits, the delivering carrier could suffer a net loss when per diem and switching costs are not adequately covered by demurrage charges retained

by the carrier. It is also contended that cars with high per diem can be used to offset low per diem cars, so that a delivering carrier cannot collect enough demurrage to offset the car costs of the high—value per diem equipment. For example, a $3.50 per diem charge for a coal hopper could offset a $22.88 per diem charge for a 60-foot boxcar.

Examples of the problems created by average agreements were cited by the SEDSB. If each credit has a value of $10 in the offsetting of debits, it states that an anomalous situation would develop. On one average agreement, reflecting a total of 64 cars, $900 in demurrage charges were assessed, with $240 representing possible pay out to foreign railroads. Yet, there would be per diem and switching charges of $845.09, so that the delivering carrier would suffer net loss of $185.09. In another instance, an average agreement covering 231 cars involved total demurrage charges of $4,770 with related costs of $6,366.11. Under the proposal $900 would be remitted to the car owners.

Opponents also contend that the purpose of the rule would be thwarted by 'runaround' claims. Runaround occurs when newly arrived cars are placed for unloading before previously arrived cars held under constructive placement. A runaround claim lists all cars in the order of arrival and constructive placement dates. The placement date of the first cars is then substituted for the date of the first constructively placed car and demurrage is recalculated on the basis of substituted dates. Therefore, the owner whose car was actually detained might not receive the penalty charge. Similar situations assertedly would result in claims for bunching, weather interference, and frozen or congealed lading.

Members of the PCDB also suggest that consideration be given to delaying the remittance of the excess charges under average agreements for a period of 6 months to

review for correctness and to minimize the handling of monies between the carriers.

Replies.—Proponents deny that there will be any problem with average agreements since debits, credits, and free days are not in issue because such matters affect unchargeable days before penalty demurrage commences. BN also states that runaround and bunching problems are resolvable and will be minimized by identifying car-ownership under this proposal.

Claim Problems

Private car and carrier proponents.—Proponents also forsee no problem with claims by a shipper against a railroad for excessive charges already paid as this is said to rarely occur. However, if the carriers desire protection against car owner bankruptcy, a bond could be posted by the car owners. In other instances, if there is a valid claim, the delivering road could withhold future payments to the car owner until the appropriate amount is accounted for.

Carrier opponents.—Carrier opponents state that they should be protected against claims for demurrage charges paid and remitted which are not applicable. They also submit that the threat of a lawsuit may force them to drop a claim which they might otherwise file lest the cost of the suit deplete or exceed the demurrage charges that the delivering road would be entitled to under the rule.

Leases

In the interim report, the Commission determined that in a lease situation, the lessee of the car should be considered the owner. Both proponents and opponents contend, however, that the only practical approach in leasing arrangements is for the delivering road to remit the excess charges to the lessor or owner of the reporting marks (those marks assigned to cars by the AAR), as is cur-

rently done with mileage allowance.[14] The lessor and lessee could adjust the lease to take into account the remittance to the lessor. The burden of recordkeeping would then be on the car-owning company.

Allied Mills [15] states that if any controls are necessary in lease situations, ones similar to those imposed under the mileage rules should be used. This would prohibit the car line from refunding to the lessee demurrage charges in excess of the rental expenses to the private car lines.

REMITTANCE TO PRIVATE CAR OWNERS AND EARMARKING

Private car and carrier proponents.—Private car proponents stress that they should be included within the proposed rule, a conclusion already reached in the interim report. They argue that they are the ones damaged by the detention of their equipment and are, therefore, entitled to be compensated. To hold otherwise, assertedly, would be discriminatory.

It is also contended that private car owners are supplying an ever-increasing proportion of the Nation's freight cars (between 1972 and 1974 private car owners and shippers added 35,711 cars to the transportation system), while carriers who have not increased their car supply are reaping the benefits of the investments of others by retaining excess demurrage charges. Archer Daniels Midland shows that the national car fleet expanded (primarily because of private investment from the years 1972 to 1974 by a total of 3,636 cars; however, the carrier fleet

[14] Hercules, Inc., asks that the Commission determine when the free time begins on trip-lease cars.

[15] Allied Mills states that the Commission was incorrect in its interim report in stating that Allied Mills favored remittance of all demurrage charges. It only favors remittance of charges in excess of $10 per car per day.

decreased by 32,075 cars. Such a significant portion of the investors in freight cars, it is argued, cannot and should not be excluded from benefiting from the proposed remittance scheme.

Carrier opponents.—Some carrier opponents contend that the Commission will err in extending the rule to private car or lessor/lessee owners (which as already noted was found appropriate in the interim report). They argue that private and carrier car owners have traditionally been treated differently by the Commission and that no justification has been presented in this proceeding for disregarding that distinction. They note that railroads have the responsibility of furnishing cars, and, thus, alone are entitled to retain excess demurrage charges. They also argue that the funds should not be remitted to the private car owners because they have not invested in cars which are in short supply, but rather in cars that are in surplus, such as tank cars and covered hoppers. The BN (a proponent of the rule in other respects) also fears that if private car owners are included, it would be counterproductive for they will have less of an incentive to release cars on time since they themselves would receive the excess demurrage charges. Lastly, the AAR argues that remittance of the charges to private owners is an unlawful rebate in violation of section 15(13) of the act which requires that payments to car owners not exceed reasonable costs.

Replies.—In reply to the allegations that the remittance to private car owners violates section 15(13), Bay State Milling Company argues that the statute applies to "excess allowances from railroad funds for railroad services performed by the shipper." As the proposed rule applies to the disposition of excess demurrage charges paid, section 15(13) is argued to be inapplicable.

If a remittance is allowed to private car owners, the AAR urges a downward adjustment in car-mileage pay-

ments and that the funds be earmarked for purposes beneficial to railroads and shippers alike, such as research and development in freight car design.

Earmarking.—In all other respects, opponents and proponents of the rule agree that there should be no earmarking of funds. Private car owners point out that there is no law which requires parties, other than common carriers by railroad, to purchase and supply railroad freight cars, and, therefore, that there is no statutory basis for earmarking of funds.

Participants also agree that earmarking would not be in the best interest of car owners. They foresee policing problems and questions as to whether it may be feasible or necessary for car owners to purchase additional cars with the fund. Forced acquisition, the carriers claim, would also distort car investment which takes into consideration factors such as freight and car-hire revenues. As in *Demurrage Rules and Charges Nationwide,* 340 I.C.C. 83, 90 (1971), it is argued that earmarking be found unwarranted.

Car Utilization and Supply

Private car and carrier proponents.—Even though they believe funds should not be earmarked for the purchase of additional cars, proponents contend that general economic principles dictate that if car owners are compensated for being deprived of their freight cars, their incentive to purchase cars will be stimulated. They agree that the Commission was correct in holding in the interim report that the proposed rule will have a positive impact on car supply.[16]

[16] A number of private car proponents did not state whether they thought the rule would increase car utilization and supply. However, they stated that if the rule was warranted, its application should be extended to private car owners.

Carrier opponents.—Carrier opponents, on the other hand, argue that the proposed rule will not increase freight car supply. They argue that the additional purchase of freight cars may be curtailed as funds once available to the delivering road will now be consumed by the administrative costs of the program or be totally lost when remitted. They further contend that the loss of these demurrage funds (there is no increase in the charge to offset the loss), will have a serious impact on roads experiencing financial difficulties. (The ASLRA states that its 1973 study group derived 3.5 percent of their gross revenue, 7.6 percent exclusive of local traffic, from arbitrary demurrage.) It is also suggested that the rule might discourage the collection of demurrage charges and decrease car utilization since the rule only applies to charges actually collected and not billable demurrage. This would, in turn, have a detrimental effect on the shippers' incentive to release cars quickly.[17]

Carriers submitted data showing the amount of demurrage charges to be remitted to carrier and private car owners. Generally the study period was July 1 through December 31, 1973. Participants agree that this test period does not accurately reflect the amount of demurrage normally chargeable, for during this period Car Service Order No. 1124 was in effect for approximately 91.69 percent of all cars. It is estimated that Service Order No. 1124 inflated the amount of demurrage subject to remittance by as much as 53 percent for the N&W; 67.55 percent for AAR member roads; and 55 percent for the Penn Central. It is, therefore, argued that the amount to be remitted when compared to the administrative costs of the rule does not justify the proposal.

[17] Carriers argue that there is no indication in the present record that presently large sums of demurrage remain uncollected or that carriers can or have the ability to influence a shipper to detain cars longer than necessary.

Appendix B shows the amount of demurrage to be remitted between various roads, and appendix C shows the amount to be remitted to specified private car owners by certain selected roads. Since not all railroads participated in this proceeding and since the reporting roads generally did not know how much demurrage would be received from other roads under the rule, it cannot be determined what the total amount remitted compared to the total amount received by a particular road would be. However, based on the data submitted by reporting roads for the last half of 1973, the amount of demurrage to be remitted can be estimated. The following table is our summary of these amounts as reported by 42 reporting roads. (See appendix D.)

TABLE 5

Amounts of demurrage payable to foreign railroads and private car owners, assuming the proposed remittance rule had been in effect during the July 1 through December 31, 1973, study period and the number of demurrage days reflected by these amounts

(1) Total amount of demurrage payable to foreign railroads, assuming the rule had been in effect during the study period	$37,752,616
(2) Total number of demurrage days reflected in line 1	1,650,127
(3) Average amount payable to foreign railroads per demurrage day	$22.88
(4) Total amount of demurrage payable to private car owners assuming the rule had been in effect during the study period	$2,634,839
(5) Total number of demurrage days reflected in line 4	122,579
(6) Average amount payable to private car owners per demurrage day	$21.50

Opponents contend that the amount to be remitted to the car owner would not affect decisions to purchase additional cars. The SP, for example, states that demurrage revenues are too insignificant and too unpredictable to

influence a decision of whether additional equipment is needed. Demurrage accounts for less than 2 percent of its freight revenues (or only 1 percent of car-hire revenues). SP states that based on its demurrage revenues in 1974, it received $250 per car. If the excess amount remitted were an additional 25 percent, this would only be $62.50 more, and represents less than 2 percent of its threshold revenue requirement of at least a 10-percent return on investment after taxes.

Lastly, opponents argue that car owners, although given the opportunity to commit themselves to purchase additional cars, have failed to do so, which is said to seriously put into question that Commission's conclusion that the Nation's car supply will actually increase. CRANDIC suggests that a more direct and less expensive way to solve the car shortage problem would be to reduce the amount of free time, do away with average agreements, and implement detention charges for storage of empty private cars.

Replies.—AAR answers that even if all the money remitted to private car owners was used to purchase additional cars, this would only amount to between $21 million and $26 million (based on a 50- to 60-percent reduction of actual demurrage charges payable for the 6-month 1973 base period to account for Service Order No. 1124). At $35,000 a car only 75 additional cars could be purchased, which would not appreciably increase car supply. Moreover, there is no guarantee that the money remitted will be used for this purpose. Because of such a limited impact and the assertedly high cost of administering the rule, AAR concludes that its adoption is not warranted.

Discussion and Conclusion

As stated in the interim report, in order to adopt the proposal, we must be satisfied that the rule will achieve

its intended purpose of increasing car supply and utilization, will be administratively feasible, and the benefits of the rule will outweigh the expenses incurred in its implementation. We have previously discussed in the interim report the positive impact the rule will have on car utilization and supply, and, therefore, a detailed discussion of our conclusions is not necessary, although we would like to reemphasize some conclusions we reached therein.

First, inadequacy of car supply has been a recurring problem in the Nation's carrier fleet. Congress has specifically recognized the problem and amended section 1(6) of the act to insure that an adequate car supply is maintained. While the Commission has taken numerous steps to alleviate car shortages by increasing incentive per diem, shortening the length of free time, and issuing car service order in addition to other innovations in this area, the problem remains. The proposed rule, we believe, will contribute to the Commission's continuing policy of encouraging the maintenance of an adequate freight car supply.

Carrier opponents argue that there is no guarantee that the amount of money to be remitted will be utilized by carrier or private car owners to purchase additional cars because, indeed, there has been no commitment to do so by these parties. However, this argument overlooks the fundamental economic proposition that a greater return on an investment will provide an increased incentive to invest in that item, whether it be stocks, land, or as in this case, freight cars. Return on investment may not be the sole factor in determining whether an investment in freight cars is made, but its influence cannot be disregarded.

As demurrage regulations presently exist, the delivering carrier, who may not own one freight car, is nevertheless entitled to the entire demurrage charge even

though this sum may far exceed any costs incurred. In addition, there is no indication that this demurrage revenue is presently being used by the delivering road to purchase additional cars. This money is, therefore, a bonus to a carrier who has no interest in whether or not a car is being detained. However, the car owner, whether private or foreign road, has its equipment detained and unavailable for further use, and thereby loses revenue. This is especially true of private car owners who do not receive per diem but a mileage allowance. The remitted amount which table 5 shows is approximately $22 for each excess day ($11 if it is assumed that Service Order No. 1124 inflated demurrage by 50 percent), which SP estimates to be approximately $62.50 a car annually, will be an added dividend to car owners. When these figures are multiplied by the vast number of cars in the transportation system, the rule will certainly have a significant positive impact on car supply.

Administrative expenses.—Those opposing the rule have argued that the costs of its administration far outweigh any benefit that can be derived from its implementation. However, the evidence of record fails to support this contention.

Carriers presently require sufficient information in their present demurrage forms to calculate the demurrage charges in excess of $10 a day. It has been adequately demonstrated that the rule is feasible from a recordkeeping and administrative viewpoint with employees or computers drawing the necessary information from existing or slightly modified demurrage forms. In addition, if demurrage bureaus are utilized, the implementation of the rule would be simplified, as there presently exists a framework for tabulating demurrage and auditing records.

Costs, of course, will be incurred in implementing and administering the rule; but it has not been shown that

these costs will be excessive. Where a carrier data shows high implementation costs, such costs in many instances are attributable to instituting a computer system where none previously existed or to hiring additional employees to do the computation on a manual basis. However, a large portion of the data on implementation costs does not specify whether the estimated costs (both startup and annual) would be incurred if demurrage bureaus were used, or if the costs are individual expenses in addition to the prorated charges of the bureaus. Costs not based on the use of demurrage bureaus, where expenses would be significantly less than an individual's expenses, significantly inflate the costs to implement and administer the rule, and thus, appear to overstate the actual amount needed.

Indeed, it has been clearly shown that demurrage bureaus can significantly cut the costs of administering the remittance scheme by economies of operation since, in most instances, the existing staff, machinery, and facilities, with slight modification, can be used to implement the proposal. Based on the data submitted by the three reporting bureaus, startup and annual expenses for administering the rule for 183 members would be $30,439 and $692,985, respectively. Using data submitted by members of the PCDB, annual and startup costs for each "excess" day, would be $0.251 and $0.035, respectively. These figures, we believe, more accurately indicate the costs of the proposed remittance scheme if demurrage bureaus are used, although we realize that carrier members may have certain expenses in addition to those of the bureaus.

In conclusion, we realize that the cost data submitted by many of the reporting roads is inflated and that many of the expenses are unsubstantiated. (For example, a carrier states that it needs four additional employees but it does not indicate how it arrived at this figure.) However, despite our reservations as to the accuracy of the cost data presented, even taking it at face value, we are nevertheless unable to find that the costs of administering the rule are excessive. As can be seen from table 4, average startup expenses of $14,219 and annual expenses of approximately $0.90 for each excess demurrage day are not unreasonable, unjustifiable, or unduly burdensome. Even if expenses were slightly higher, the evidence of record still supports the finding that the costs of administering the rule are not prohibitive.

The record also indicates that in terms of cost-benefit, the proposed rule is justified. Table 5 shows that the total amount of demurrage that would have been remitted for the period July 1 through December 31, 1973, to private and foreign car owners by 42 roads is $40,387,455. Even if we discount the effects of Service Order No. 1124, which inflated this figure by an estimated 50 percent, $20,193,727 would still have been remitted to car owners during this 6-month period. This discounted amount would constitute between a $10 and $11 return on a car owner's investment for each excess demurrage day. When this amount is compared to the costs of administering the rule, it becomes evident that the costs are not so burdensome as to outweigh the rule's benefit in providing an incentive for the purchase of additional equipment and, thereby, in increasing car supply.

Inadequacy of amount.—It has been contended by some carrier opponents, especially the ASLRA, that the $10 to be retained by the delivering road is insufficient to meet delivering carrier costs (per diem, switching, and administrative expenses).

The switching costs are reflected in the line-haul rate by Rail Form A's unit costs. These figures are based on average costs for a particular region and are used to calculate the switching costs associated with line-haul movements. Per diem expenses are also used in computing the line-haul rate. Therefore, it is incorrect to assume that the $10

to be retained by the delivering roads is the only source of revenue available to cover switching costs and per diem expenses. Since the evidence indicates that these costs in certain instances are not presently recoverable from demurrage charges (although it is not clear whether the expenses are covered by other revenue), an adjustment in the reclaim allowance, switching charge, or division of rates may be needed.[18] Then, if it can be shown that the costs of the delivering railroad are not consistently being met, the carrier is free at any time to seek increases in applicable rates and charges.

The adequacy of demurrage is not in issue in this proceeding. If any carrier can demonstrate that its costs (per diem, switching, and administrative expenses) are not being met, the proper recourse is to petition the Commission to increase the amount of basic demurrage or other

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[18] Notice is taken of Rule 5, Code of Car Hire Rules and Interpretations-Freight, "The Official Railway Equipment Register," Vol. 92, No. 1 (July 1976). It provides that:

> (a) An amount (Note 1) for each loaded car handled in Terminal Switching Service except as otherwise provided in paragraph (b) may be reclaimed by each individual switching road from the road for which the service was performed. In determining the amount, an average number of days not to exceed five (5) shall be used. The average number of days shall be determined annually, or at such other periods as may be agreed upon by the interested roads, by an examination of the records (Note 2) of each individual switching road for each local territory. However, on the request of the majority of the interested roads in any local territory, the settlement of terminal switching reclaims will be on the basis of actual time involved in handling of cars during the month for which reclaim is made subject to a maximum of (8) days on any one car and the maximum average of five (5) days per car.
>
> Note 1.—The word "amount" as used in this rule shall be the product of (1) average time established as an arbitrary, or actual time, subject to maximums provided in this Rule, and (2) the actual car hire rate on each car handled in switching service.

appropriate rate or charge. A deficiency in basic demurrage, switching charges, or other rate or charge, should not be offset by revenue from penalty demurrage. To do so would vitiate the incentive element of arbitrary demurrage and also, as noted in the interim report, deprives the car owner of part of the return on his investment. In the event that basic demurrage would be increased in excess of $10, these rules would be adjusted accordingly to provide that the car owners would receive the demurrage in excess of the higher level of basic demurrage.

Average agreements and claims.—We do not feel that average agreements present the problem that the railroads have envisioned. The proposed rule only affects demurrage in excess of $10. Under present average agreements a credit of $10 is used to offset a debit of $10, and, therefore, the delivering carrier will not receive any demurrage on a haul where no arbitrary demurrage is assessed. This will not be changed. The rule provides that the delivering carrier shall retain $10 of the charges collected, the demurrage in excess of the $10 debit up to $10 will be retained by the delivering road. Therefore, the rule will have no adverse impact on average agreements since (1) carriers presently receive no compensation for debit days which are offset by credit days, and (2) the delivering road, as in other situations, will retain up to $10 for arbitrary days which has been found to be sufficient to cover costs. It has not been sufficiently shown that a carrier's costs would not be met by the sum to be retained ($10) under average agreement. However, as in the case of our discussion of switching and other administrative costs, if it can be established that costs are not being met, the carrier can seek relief from the Commission to retain a greater amount.

We would like to make a suggestion to those who argue that average agreements are not feasible because high per diem cars can be used to offset low per diem cars and, therefore, costs will not be covered by the $10 to be re-

tained by the delivering carrier. The per diem charge is based on numerous factors including the cost of equipment and its relative supply in the marketplace. To increase car supply and utilization, the carriers could provide that a credit and debit will not offset each other unless the per diem charges are relatively similar, i.e., within a range of 20 percent or some other figure. This would prohibit the offsetting of a $3.50 coal car with a $22.88 60-foot boxcar. This avenue of compromise should be explored before carriers consider implementing their threats to terminate average agreements.

Another area of expressed concern is that of runarounds. We feel that respondents can devise a method of dealing with this situation in order to fulfill the purposes of the rule in compensating an owner whose car is actually detained. Under the present demurrage system, no problem is presented because the delivering carrier keeps all demurrage, and hence no provisions are presently necessary. However, this does not mean that a solution does not exist. For example, in runaround situations, the amount to be remitted to each car owner could be determined as follows:

Total chargeable demurrage—($10 × total days all cars ÷ Amount to be remitted to car owners subject to runaround are held)

$$\frac{\text{Amount to be remitted}}{\text{Number of days cars held}} = \text{amount per day}$$

This amount multiplied by the number of days the car was held would determine what amount is to be remitted to each car owner.[19]

[19] For example: Car owned by X was constructively placed on day 1, car owned by Y constructively placed on day 2, and car owned by Z placed day 3. Car X is released day 6, Car Y released day 5, and Car Z released day 4. Demurrage is computed at $10 the first day, $20 the second, and $30 thereafter. In a runaround situation, the released dates on later-placed cars will be substituted for those of earlier placed cars. The total amount of demurrage that could be assessed under the runaround claim is $180. The total number of days held by all cars is 9 days. Therefore, the delivering carrier would subtract $90 as the amount it would retain. The remaining $90 would then be divided by the number of days the cars were actually held (9) to get the amount per day of $10. This multiplied by the days each car was held would give us the amount to be remitted to each owner. $50 to X, $30 to Y, and $10 to Z.

See section 1, rule 8, section E note 1 of the Demurrage Tariff 4-J, ICC H-59, for a thorough analysis and computation of demurrage in a runaround claim.

Claims.—Next we will discuss the argument that claims against shippers for demurrage charges in some cases may not be pursued where legal fees for collecting these claims exceed the amount to be retained by the delivering road.

In addressing this contention we note that a carrier is under a legal obligation to collect demurrage charges properly assessed, and the implementation of this rule does not relieve a carrier of this duty. However, only a small percentage of claims are contested, and expenses incurred in pursuing these claims would generally be recoverable from the $10 to be retained by the delivering road. It is also noted that demurrage bureaus handle claims and prorate the costs to their members so that the cost burden is shared by a number of carriers. We, therefore, conclude that legal expenses incurred in collecting demurrage charges would not be a problem under the proposed remittance scheme. If, however, it can be shown as stated above, that costs are not being met, a carrier can seek relief from the Commission to retain a higher amount.

In situations were (a) a carrier has received demurrage charges from the shipper and has remitted this amount to the owner, and (b) it is later determined that the charges were in fact not applicable or otherwise lawfully due, then the carrier can seek direct reimbursement from the car owner or withhold forthcoming remittances until the amount is satisfied. The best method of solving this problem can best be determined, however, by the respondents themselves.

Private car owners.—The interim report concluded that the proposed remittance rule should also apply to private car owners. This determination was sound. An increasing percentage of the Nation's carrier fleet is owned by private interests. The evidence shows that between 1972 and 1974 private car owners and shippers added 35,711 cars to the transportation system. These investors should receive a fair return on their investment as well as carriers. Some proponents note that private car owners have made investments in freight cars without the rule and may continue to do so, if the proposed rule is not implemented. While this may be true, it is an unconvincing argument for concluding that, therefore, no additional incentive is needed. Indeed, such investments may have been much greater if the incentive heretofore had been in effect.

For those who argue that the remittance would be an unlawful rebate, we reiterate our position stated in the interim report (349 I.C.C. 411, 438), that rebates are not involved because the delivering carrier will receive its full rate and compensation for all demurrage charges and will merely remit the excess to the car owner.

In the interim report we concluded that the remittance in lease situations should be paid to the lessee. Although the Commission has held that the lessee is the car owner in considering other demurrage questions (see *Car Demurrage Rules, Nationwide,* 350 I.C.C. 777 (1975)), we feel that under the proposed rule it would generally be more efficient and administratively practical to have the excess demurrage remitted to the lessor as is done with the mileage allowance. The administrative costs would then be incurred by the lessor in determining what amount if any, should be remitted to the lessee. Existing demurrage rules as to when "free time" begins (or as the lease agreement otherwise specified) would be controlling in determining when demurrage begins.

However, in a long-term lease of equipment by a private car owner to a railroad, the lessee should be considered

the car owner as proposed in the interim report. This would simplify the administration of the rule, for the reporting marks on the car would be that of the lessee, and the delivering carrier would not be aware of the identity of the lessor, or if in fact, the car is leased.

We believe, however, that restrictions on the amounts to be remitted to private car owners are necessary to encourage and not discourage the timely release of equipment. For example, assume private car owner X is the consignee or consignor of a car on which excess demurrage accrues because of causes attributable to X. (This could occur when there is congestion on X's track, or when there are no private tracks and the car is held on carrier track.) X would pay the delivering carrier the demurrage charges and any excess demurrage would then ultimately be remitted to the car owner, X. Therefore, X would only pay $10 per car per day and no penalty or arbitrary charge. This would nullify the incentive to release quickly the car which is provided by the penalty portion of the demurrage charge.

To correct this situation, the proposed rule will be modified as follows:[20]

> (c) Excess demurrage shall not be remitted to a private car owner who for reasons attributable to the owner causes the accrual of the excess charge. The excess amount, which would otherwise be remitted under the rule, shall in these situations be retained by the delivering carrier.

In determining if the excess demurrage is caused by reasons attributable to the car owner, this provision shall be

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[20] Leases can provide for an adjustment if the demurrage is caused by reasons attributable to the lessor or lessee.

interpreted and applied in accordance with demurrage rules and principles.

Earmarking.—Lastly, we conclude that no restrictions should be placed on the use of the funds to be remitted to car owners, either private or foreign roads. It would be difficult to force a car owner to purchase additional equipment, and to supervise and administer such a provision. The proposed remittance is a sufficient incentive to the purchase of additional cars without putting an absolute limit on the use of the remitted funds.

Upon consideration of the record, we conclude that adoption of the proposed rule, as amended, which is set forth below, would be in the public interest, is reasonable and otherwise lawful to "the maintenance of an adequate freight car supply" as required by section 1(6) of the act.

(a) Except as otherwise provided hereinafter, the nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the freight car owner, all demurrage charges collected in excess of $10 per car per day.

(b) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor; except that in cases where there is no notice of the identity of the lessor, the lessee shall be considered as the car owner.

(c) Excess demurrage shall not be remitted to a private car owner who for reasons attributable to the car owner causes the accrual of the excess charge. The excess amount, which would otherwise be remitted under the rule, shall in these situations, be retained by the delivering carrier.

FINDINGS

We find:

(1) That the Commission has jurisdiction under section 1(6) of the act, as amended, and under its car service powers to consider the proposed demurrage remittance rule;

(2) That the proposed remittance to the freight car owner, except as restricted hereinafter, by a nonowning railroad, on whose lines a car is being detained under demurrage, of all demurrage charges collected in excess of $10 per car per day, is just, reasonable, and otherwise lawful;

(3) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor; except that in cases where there is no notice of the identity of the lessor, the lessee shall be considered as the car owner;

(4) That excess demurrage shall not be remitted to a private car owner who causes the accrual of that excess charge, but such amount shall be retained by the delivering carrier;

(5) That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER MURPHY, concurring in part, dissenting in part:

I am in agreement with the majority to the extent that it would promulgate regulations embodying the proposed remittance of demurrage charges as between regulated common carriers by railroad. The implementation of that long-delayed program first conceived in 1972 should result in a marked improvement in freight car supply and utili-

zation not only to the carriers but also to the shipping public. As such, it is another small step in this Commission's endeavor to improve the Nation's freight car supply. It is readily apparent that all problems relating to car supply cannot be resolved at one time or in one proceeding. See, in this connection, *Maintenance of Records Pertaining to Demurrage,* 352 I.C.C. 739, 793-794. Nevertheless, it is regrettable that this program was so unduly delayed. Undoubtedly, if the regulations were in effect, even on an interim basis, the several severe car shortages occurring subsequent to publication of the proposal would surely have been eliminated or ameliorated.

Turning next to the proposed extension of the remittance program to private car owners, the majority's decision aptly points to the many incipient problems awaiting that aspect of the proposal. A review of the record clearly shows that the private car owners actually contributed little to the resolution of this proceeding. And the majority tacitly acknowledges that deficiency by its recognition that the private car owners can only be included in the program by consideration of the evidence submitted by the railroads. In my separate expression, *Remittance of Demurrage Charges,* 349 I.C.C. 411, 444, I recognized such a distinct possibility and urged that the parties, including private car owners, be made aware of the need to furnish adequate data.

With respect to private cars, it is unclear as to who, the lessor or lessee, should or will receive the remittance. The extension of the program to private car owners will provide an opportunity for rebating or undue prejudice. Ideally, the private car owner, the lessor, should assume its recognized responsibilities by the proper placarding of its car or by meeting the other requirements of the demurrage tariffs so that where the car is actually on the private tracks of the lessee the railroads will not be concerned with demurrage collection or other related problems.

Where the private car is held on railroad tracks at destination for lessee's purposes, then any resulting demurrage on the private car over $10 per day should be retained by the destination carrier. The railroads should not be required to act as a collection agency for the lessor of the private car without some form of compensation for those additional duties. Cf., the tariff provisions applying on c.o.d. services. As between railroads, the situation is different since they must settle among themselves the apportionment of revenues and payment of various costs or charges incurred in performing a transportation service.

The majority also implies that the railroad can offset erroneously remitted demurrage to private car owners by a deduction from future accounts. Whether that procedure is legally sound has not been adequately explained. Cf., the transit tariffs and procedures thereunder and 49 U.S.C. 66 applying on Government traffic.

To the extent that the majority's decision differs from the views expressed above, I respectfully dissent therefrom.

COMMISSIONER CHRISTIAN, whom COMMISSIONER MACFARLAND joins, dissenting:

I do not believe that the public benefits envisioned by the majority will materialize when the proposed rule is adopted.

The report foresees increased car utilization. However, with demurrage charges unchanged, I see no reason for a delinquent car user to change its habits. The proposed rule provides no incentive for a user to release cars held beyond free time.

The report foresees an improved car supply. It assumes that the demurrage charges remitted to the car owner will be used for car purchases. It also assumes that this minor increment in a car owner's return will influence future investment decisions. The report contains no economic analy-

sis to support these assumptions, and in my opinion the available evidence appears to contradict these assumptions.

The cost of the program does not seem to justify the sole benefit of returning additional monies to the car owner. I do not think we should take an isolated action affecting freight car compensation when we know that the incentive per diem program, the mainstay of Commission efforts in this area, is currently being reevaluated. I believe that DOT is correct in suggesting a complete reassessment by the Commission of all rules governing freight car distribution and utilization rather than taking a narrow, disjointed action here.

COMMISSIONERS HARDIN and GRESHAM did not participate.

APPENDIX A

ASLRA study group data showing the relationship of demurrage to per diem

Railroad	Number of cars	Demurrage	Net per diem	Demurrage: After XP 289	Demurrage: Over/under net per diem [1]
Class I S&T					
PBR [2]	151,563	$1.50	[3] $0.35	$0.99	$0.64
SB	91,709	2.89	0.73	1.94	1.21
PBNE	75,123	1.90	0.48	1.30	0.82
CBL	72,559	1.46	1.45	1.15	(0.30)
ALQS	70,024	11.38	2.11	6.26	4.15
LT	53,981	4.56	1.78	3.52	1.74
BS	50,712	0.89	3.03	0.55	(2.48)
MCRR	35,255	20.36	4.48	10.98	6.50
RT	30,351	2.42	3.86	1.96	(1.90)
CUVA	21,609	18.08	3.34	10.47	7.13
Class II S&T					
MKC	20,446	11.66	5.02	6.20	1.18
DC	20,377	3.40	6.51	3.05	(3.46)
UMP	17,542	7.56	2.98	2.79	(0.19)
NSS	16,329	2.75	3.97	1.79	(2.18)
CTN	10,233	6.48	1.71	3.57	1.86
POV	7,512	1.66	(1.36)	1.40	2.76
WYT	5,316	17.82	5.41	6.63	1.22
MET	5,300	0.59	4.11	0.45	(3.66)
JSC	3,522	4.40	1.18	2.86	1.68
MJ	1,047	78.19	16.93	34.99	18.06
EEC	555	66.72	13.08	27.01	13.93
TN	28,925	8.83	4.48	4.67	0.19
CIC	7,424	19.61	12.91	13.18	0.27
GNWR	6,717	0.35	2.36	0.35	(2.01)
NLG	3,508	9.06	23.96	5.57	(18.39)
APA	3,390	2.46	11.73	1.19	(10.54)
SRN	3,089	6.25	9.13	4.33	(4.80)
EACH	2,193	0.15	4.08	0.14	(3.94)
LRS	2,045	2.98	5.93	1.37	(4.56)
LEF	1,987	1.02	8.00	0.66	(7.34)
LNW	1,816	1.44	28.61	1.14	(27.47)

APPENDIX A—Continued

ASLRA study goup data showing the relationship of demurrage to per diem—Continued

Railroad	Number of cars	Demurrage	Net per diem	Demurrage: After XP 289	Demurrage: Over/under net per diem [1]
Class II S&T—Continued					
VSO	1,664	3.43	11.80	1.83	(9.97)
CHV	1,474	5.07	9.26	2.67	(6.59)
DR	1,143	5.26	18.67	3.43	(15.24)
ME	867	3.23	26.54	3.03	(23.51)
VCY	843	1.58	9.29	1.13	(8.16)
IAT	807	10.30	12.33	6.83	(5.50)
GRN	725	1.10	6.62	0.98	(5.64)
BML	668	4.97	26.88	2.92	(23.96)
MCSA	592	0.96	2.07	0.93	(1.14)
NB	533	....	4.86	....	(4.86)
CLCO	391	4.63	3.46	2.99	(0.47)
MB	310	0.06	5.73	0.03	(5.70)
FCIN	259	7.34	21.72	5.98	(15.74)
FJG	223	52.83	25.38	22.06	(3.32)
CLIF	139	10.43	7.50	6.47	(1.03)

[1] Net per diem is gross per diem including mileage, less per diem reclaim where applicable.

[2] For the alphabetical designations assigned by the Accounting Division of the Association of American Railroads and used in column A of pages 2 and 3 of this exhibit and elsewhere in ASLRA exhibits, the full railroad names are given in [ASLRA] appendix A. E.g., ALQS is the alphabetical designation for Aliquippa and Southern Railroad Company.

[3] ASLRA in its reply statement, submits that nonincentive per diem has increased by 12 percent from the time this chart was compiled, and therefore, the per diem deficits are understated by 12 percent.

APPENDIX B

Remittance of excess demurrage to foreign roads

Amount payable to foreign roads during test period of July 1, 1973 through December 31, 1973	ATSF	BN	CNW	CRIP	CO	D&RGW	FEC	ICG	MP	N&W	PC	SCL	SOU	SP	UP	Total amount payable to all foreign roads
Atchison T. & S.F.		$114,637	$30,650	$45,133	$24,270	$25,481	$10	$42,740	$88,385	$42,501	$96,680	$18,730	$45,400	$114,909	$113,340	$1,222,611
Burlington Northern	$58,080		96,980	37,380	33,250	20,960		49,650	57,360	61,100	47,240	25,240	37,230	43,930	102,230	1,058,210
Chicago North Western	63,381	275,560		46,974	84,410	7,080		75,320	58,610	59,910	219,980		68,240	34,189	85,479	1,601,792
Chicago Rock I. & Pacific						No information presented by CRIP										
Chessie System [1]	147,405	148,508	74,940	63,340	468,429	9,899	40	131,209	101,983	250,460	591,370	108,400	268,225	92,230	111,389	3,586,354
Denver & Rio Grande Western						No information presented by D&RGW										
Florida East Coast [2]	2,900	5,490	760	3,980	9,020	160		24,870	3,330	3,290	13,050	38,660	56,110	3,620	2,140	214,520
Illinois Central Gulf	137,022	92,133	190,150	49,180	23,140	3,090	40		121,945	77,410	85,051	42,060	100,400	40,760	49,560	1,622,377
Missouri Pacific [3]	246,354	17,660	53,470	88,730	55,425	12,070		63,340	142,485	55,800	90,930	33,170	84,365	66,975	91,490	1,953,404
Norfolk & Western	36,046	93,524	56,860		145,230	5,101		43,560	47,380		180,796	350	64,030	55,412	72,024	1,299,523
Penn Central [4]	225,570	376,360	254,770	136,340	576,410	37,070	80	242,100	265,020	629,280		275,870	601,650	226,160	262,480	7,879,450
Seaboard Coast Line	75,743	80,441	32,001	22,810	79,060	4,122	2,850	179,824	52,865	91,815	118,142		415,658	61,202	31,132	1,817,140
Southern Ry.	50,694	87,490	35,860	35,525	179,515	3,260	370	141,215	114,041	93,205	174,255	217,243		62,920	40,382	1,235,975
Southern Pacific	276,900	136,450	24,180	25,650	26,740	37,390		82,550	77,120	35,060	72,270	17,290	38,370	295,830		1,505,385
Union Pacific	30	28,330	7,710	3,760	3,260	8,080		5,890	15,420	4,760	5,420	1,870	6,740	44,550		260,600
[4] If no service order had been in effect during the test period the amount to be remitted by PC would be as follows:																
	93,670	137,400	95,740	52,210	239,370	16,250	20	86,290	100,400	257,600		93,710	223,930	105,420	110,560	

[1] The Chessie System includes the Chesapeake & Ohio, the Baltimore and Ohio, Staten Island Corp. and Western Maryland Ry.

[2] The FEC figures above submitted differ somewhat from those submitted by Southeastern Demurrage and Storage Bureau.

[3] MP includes the Texas & Pacific, and the Chicago & Eastern Illinois.

APPENDIX C

Remittance of excess demurrage to private car owners

	General American Transport [1]	North American Car Corporation	Pullman Transportation Leasing Company	Shipper's Car Line	Trailer Train Co.	Union Tank Car	Total amount payable to all private car owners
ATSF	18,090	20,110	18,420	13,195	5,014	7,890	121,909
BN	29,730	22,130	5,440	14,550	7,100	11,300	123,570
CNW	24,580	25,610	12,110	17,870	16,830	3,820	129,640
CRIP							
Chessie	17,410	6,750	650	7,230	9,300	4,250	200,476
D&RGW							
FEC	810	60		20	850	140	3,410
ICG	6,410	40,745	6,500	20,260	2,870	11,780	147,864
MP	19,060	8,110		17,420	12,855	8,330	103,805
N&W	22,130	13,020	5,780		10,550	1,510	97,733
PC *	167,990	53,340	15,520		1,180	29,780	538,110
SCL	27,770	13,175	4,450	13,230	4,016	5,420	98,327
SOU	21,600	16,240	7,315	13,810	10,110	4,430	107,417
SP	21,640	22,505	28,690	27,890	16,500	28,966	204,685
UP	5,910	4,550	7,580	7,150	860	2,800	35,740
* If no service order had been in effect, PC would have remitted the following to private car owners:							
PC	167,990	37,900	68,500		1,810	2,930	

[1] Where the participants used car reporting marks, we used *The Official Railway Equipment Register,* Vol. 92, No. 1 (1976) to determine the car owners.

APPENDIX D

The following is a list of the 42 roads used to estimate the cost of administering the rule. Only roads submitting complete data (number of excess days, amount to be remitted, and administrative costs) for the study period July 1 through December 31, 1973, were used.

Burlington Northern Inc.
Penn Central Transp. Co. (ConRail)
Florida East Coast Ry. Co.
Union Pacific R.R. Co.
Chicago, Milwaukee, St. Paul-Pacific
Southern Railway System
Norfolk and Western Ry. Co.
Chicago and North Western Transp. Co.
Southern Pacific Transp. Co.
Western Pacific R.R. Co.
Oakland Terminal Ry. Co.
Central Calif. Traction Co.
Portland Traction Co.
San Manuel Arizona RR Co.
Holton Inter-Urban Ry. Co.
San Diego & Ariz. Eastern Ry.
Sacramento Northern Ry. Co.
Tidewater Southern Ry. Co.
Atchison Topeka & Santa Fe Rwy. Co.
Belt Railway Company of Chicago
Boston and Maine Corp.
Central Railroad Company of New Jersey
The Chessie System
C P Rail
Detroit, Toledo and Ironton RR Co.
Detroit & Toledo Shoreline RR
Duluth Missabe and Iron Range
Illinois Central Gulf RR
Illinois Terminal RR Co.
Kansas City Southern Lines
Lake Superior and Ishpeming R.R.
Los Angeles Junction Ry. Co.
Maine Central
Manufacturers Railway Co.
Missouri-Kansas-Texas Railroad
Missouri Pacific Railroad

The Monongahela Ry. Co.
Southern Pacific Transp. Co. (Texas & Louisiana Lines and St. Louis Southwestern Railway Company)
Louisville & Nashville R.R.
St. Louis-San Francisco Rwy. Co.
Terminal Railroad Ass'n.-St. Louis
The Texas Mexican Ry. Co.

ORDER

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER C—ACCOUNTS, RECORDS, AND REPORTS
PART 1254—MAINTENANCE OF RECORDS PERTAINING TO DEMURRAGE, DETENTION, AND OTHER RELATED ACCESSORIAL CHARGES BY RAIL COMMON CARRIERS OF PROPERTY

EX PARTE NO. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

It appearing, That pursuant to part I of the Interstate Commerce Act [sections 1(4), 1(5), 1(6), 1(10), 1(11), 1(13), 1(14), 1(15), 1(17), 1(21), 6(7), 13(4), and 15(1) thereof, the national transportation policy (49 U.S.C. preceding section 1)] and the Administrative Procedure Act (5 U.S.C. sections 553 and 559), a rulemaking proceeding was instituted by the Commission on October 12, 1972, for the purpose of considering whether the following rule should be adopted: "The nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day."

It further appearing, That investigation of the matters and things involved in this proceeding has been made and that the Commission has made and filed its report herein containing its findings of facts and conclusions thereon, which report is hereby referred to and made a part hereof, and which finds that adoption of the proposed rule, as amended therein, is warranted; wherefore,

It is ordered, That Part 1254 of Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended as follows:

Sec. 1254.10.—Remittance of excess demurrage charges.

(a) Except as otherwise provided hereinafter, the nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the freight car owner, all demurrage charges collected in excess of $10 per car per day.

(b) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor; except that in cases where there is not notice of the identity of the lessor, the lessee shall be considered as the car owner.

(c) Excess demurrage shall not be remitted to a private car owner who for reasons attributable to the car owner causes the accrual of the excess charge. The excess amount, which would otherwise be remitted under the rule, shall in these situations, be retained by the delivering carrier.

It is further ordered, That this order shall become effective 90 days after the date of service, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Wash-

ington, D.C., and by forwarding appropriate notice to the Director, Office of the Federal Register.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1714 and 77-1732

BALTIMORE AND OHIO CHICAGO TERMINAL RR. Co., et al.,
Petitioners in 77-1714

ALIQUIPPA AND SOUTHERN RR. Co., et al.,
Petitioners in 77-1732

v.

U.S.A. AND INTERSTATE COMMERCE COMMISSION,
Respondents.

SUR PETITION FOR REHEARING

EN BANC

Present: SEITZ,* *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ ARLEN M. ADAMS
Arlen M. Adams
Circuit Judge

Dated: October 5, 1978

* Chief Judge Seitz recused in No. 77-1714. Hon. Max Rosenn recused in both cases.

APPENDIX E

Statutory Provisions Involved

Subtitle IV of the United States Code

The pertinent portions of 49 U.S.C. §§ 10101 *et seq.*, are as follows:

Section 10102 (23), provides:

"transportation" includes—

(A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

Section 10701, provides:

(a) A rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.

Section 10705, provides:

(a)(1) The Interstate Commerce Commission may, and shall when it consider it desirable in the public interest, prescribe through routes, joint classifications,

joint rates (including maximum or minimum rates or both), the division of joint rates, and the conditions under which those routes must be operated, for a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II (except a motor common carrier of property), or III of chapter 105 of this title.

(b) The Commission shall prescribe the division of joint rates to be received by a carrier providing transportation subject to its jurisdiction under chapter 105 of this subtitle when it decides that a division of joint rates established by the participating carriers under section 10703 of this title, or under a decision of the Commission under subsection (a) of this section, does or will violate section 10701 of this title. When prescribing the division of joint rates of a rail or water carrier under this subsection, the Commission shall consider—

(1) the efficiency with which the carriers concerned are operated;

(2) the amount of revenue required by the carriers to pay their operating expenses and taxes and receive a fair return on the property held and used for transportation;

(3) the importance of the transportation to the public;

(4) whether a particular participating carrier is an originating, intermediate, or delivering line; and

(5) other circumstances that ordinarily, without regard to the mileage traveled, entitled one carrier to a different proportion of a rate than another carrier.

* * *

(e)(1) The Commission may begin a proceeding under subsection (a) or (b) of this section on its own

initiative or on complaint and may take action only after a full hearing. The Commission must complete all evidentiary proceedings to adjust the division of joint rates for transportation by rail carrier within one year after the complaint is filed if the proceeding is brought on complaint or within 2 years after the commencement of a proceeding on the initiative of the Commission and must take final action by the 270th day after completion of the evidentiary proceedings. The Commission may decide to extend such a proceeding to permit its fair and expeditious completion, but when the Commission cannot meet those time limits, it must report its reasons to Congress.

Sections 10741(a) and (b) provide:

(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

Section 10747, provides:

A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title may publish in a tariff filed with the Commission under subchapter IV of this chapter a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service. The Commission may prescribe the maximum reasonable charge or allowance a carrier subject to its jurisdiction may pay for a service or instrumentality furnished under this section. The Commission may begin a proceeding under this section on its own initiative or on application.

Section 10750, provides:

A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—

(1) freight car use and distribution; and

(2) maintenance of an adequate supply of freight cars to be available for transportation of property.

Section 10761, provides:

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or re-

ceive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

Section 11903, provides:

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

(b) A carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or an officer, director, receiver, trustee, lessee, agent, or employee of a corporation that is subject to the jurisdiction of the Commission under that chapter, that willfully does not file and publish its rates or tariffs as required under chapter 107 of this title or observe those tariffs until changed under law, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

(c) When acting in the scope of their employment, the actions and omissions of persons acting for or employed by a carrier or shipper that is subject to subsection (a) or (b) of this section are considered to be the actions and omissions of that carrier or shipper as well as that person.

(d) Trial in a criminal action under this section is in the judicial district in which any part of the violation is committed or through which the transportation is conducted.

APPENDIX F

SERVICE DATE
OCTOBER 19, 1972

NOTICE OF PROPOSED RULEMAKING AND ORDER
49 CFR CHAPTER X

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 12th day of October, 1972.

EX PARTE NO. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

This proceeding is being initiated to examine and consider the need for requiring all common carriers of property by railroad subject to the jurisdiction of this Commission to remit to the railroad freight car owner all demurrage charges over and above $10 per car per day collected and retained by a railroad on foreign cars being detained on its lines.

Demurrage is a charge imposed on shippers and receivers for the detention of freight cars beyond the allotted free time period for loading and unloading the freight cars. While its primary purpose is to expedite the release of the freight car, it is also a source of revenue to offset the per diem charges paid by the non-owner railroad to the owner of the car.

To discourage the unnecessary detention of freight cars by shippers and receivers, the Commission has recently authorized a substantial increase in the demurrage charges, in *Demurrage Rules and Charges, Nationwide*, 340 I.C.C. 83 (1971). After the expiration of the free time period, the presently applicable demurrage charges generally apply in increments of $10, $20, and $30 per car per day depending on the extent of the detention period. The first increment, $10, appears to be more than adequate to compensate the railroad on whose lines the foreign freight car is being detained in that it provides sufficient revenues to cover the payment of per diem, to compensate the railroad for the use of the track space on which the car is being detained and to provide an incentive for the prompt loading and unloading of freight cars by shippers and receivers.

However, detention of the foreign car on the lines of the non-owner offers no incentive for the railroad car owner to acquire additional cars in order to earn freight revenues, which is the primary purpose of the acquisition of cars. Therefore, remittance by the non-owner railroad of all demurrage charges in excess of $10 per car per day will accomplish two important purposes. It will create an added incentive for the railroad car owner to acquire additional cars and it will remove any inducement on the part of the non-owner railroad to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

It is for these purposes that the instant rulemaking proceeding is instituted.

It appearing, That the collection and retention of demurrage charges by the non-owning carrier on whose lines the car is being detained in an amount over and above $10 per car per day does not comport with the purposes, goals, and objectives of the Interstate Commerce Act, the rules and regulations promulgated by the Commission thereunder, and the National Transportation Policy in that the railroad owner of the car receives only a small portion of the demurrage charge through the per diem rate; that the non-owning railroad has little incentive to expedite return of the car when it retains demurrage collections exceeding its own per diem expenses on the car; that the owner is deprived of the use of the car to earn revenue, which revenue potential exceeds the per diem rate paid by the non-owning railroad for use of the car; and that, as a result, the owner is discouraged from acquiring additional cars for revenue purposes;

And it further appearing, That this proceeding is not anticipated to have any adverse effects upon the quality of the human environment; and good cause appearing therefor:

It is ordered, That a proceeding be, and it is hereby, instituted under the provisions of Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), including 1(4), 1(5), 1(6), 1(10), 1(11), 1(13), 1(14), 1(15), 1(17), 1(21), 6(7), 13(4), and 15(1), thereof, the National Transportation Policy (49 U.S.C. preceding § 1), and the Administrative Procedure Act, 5 U.S.C. § 553 and 559, to determine whether the facts and circumstances require or warrant the adoption of the proposed regulation set forth in the Appendix to this notice and order, or other regulations of similar purport applicable to common carriers of property by railroad subject to the Interstate Commerce Act, and for the purpose of taking such other and further action as the facts and circumstances may justify and require.

It is further ordered, That all common carriers of property by railroad operating in interstate or foreign commerce within the United States and subject to the Interstate Commerce Act, be, and they are hereby, made respondents in this proceeding.

It is further ordered, That no oral hearing be scheduled for receiving of testimony in this proceeding unless a need should later appear, but that respondents or any other interested persons may participate in this proceeding by submitting for consideration written statements of facts, views, and arguments on the subject mentioned above, or any other subjects pertaining to this proceeding.

It is further ordered, That any person intending to participate in this proceeding by submitting initial or reply statements, or otherwise, shall notify this Commission, by filing with the Secretary, Interstate Commerce Commission, within 30 days of the service date of this order, the original and one copy of a statement of his intention to participate.

Inasmuch as the Commission desires wherever possible (a) to conserve time, (b) to avoid unnecessary expense to the public, and (c) the service of pleadings by parties in proceedings of this type only upon those who intend to take an active part in the proceeding, the statement of intention to participate shall include a detailed specification of the extent of such person's interest, including (1) whether such interest extends merely to receiving Commission releases in this proceeding, (2) whether he genuinely wishes to participate by receiving or filing initial and/or reply statements, (3) if he so desires to participate as described in (2), whether he will consolidate or is capable of consolidating his interests with those of other interested parties by filing joint statements in order to limit the number of copies of pleadings that need be served, such consolidation of interests being strongly urged by the Commission, and (4) any other pertinent information which will aid in limiting the service list to be issued in this proceeding; that this Commission shall then prepare and make available to all such persons a list containing the names and addresses of all parties desiring to participate in this proceeding and upon whom copies of all statements must be filed; and that at the time of service list the Commission will fix the time within which initial statements and replies must be filed.

And it is further ordered, That statutory notice of the institution of this proceeding be given to the general public by mailing a copy of this order to the Governor of every State and to the Public Utilities Commission or Board of each State having jurisdiction over transportation, by depositing a copy of this order in the office of the Secretary, Interstate Commerce Commission, Washington, D.C., for public inspection, and by delivering a copy thereof to the Director, Division of the Federal Register, for publication in the Federal Register as notice to all interested persons.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX

The non-owning railroad, on whose lines a car is being retained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per car per day.

APPENDIX G

SERVICE DATE
APRIL 25, 1975

NOTICE OF PROPOSED FURTHER AND AMENDED RULEMAKING AND ORDER

49 CFR CHAPTER X

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D.C., on the 28th day of March, 1975.

EX PARTE NO. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

In the original Notice of Proposed Rulemaking and Order in this proceeding, dated October 12, 1972, the Interstate Commerce Commission ordered the institution of a proceeding under the provisions of Part I of the Interstate Commerce Act (49 U.S.C. 1 *et seq.*), including 1(4), 1(5), 1(6), 1(10), 1(11), 1(13), 1(14), 1(15), 1(17), 1(21), 6(7), 13(4) and 15(1), thereof, the National Transportation Policy (49 U.S.C. preceding § 1), and the Administrative Procedure Act, 5 U.S.C. §§ 553 and 559, to determine whether the facts and circumstances required or warranted the adoption of the following proposed regulation, or other regulations of similar purport applicable to common carriers of property by railroad subject to the Interstate Commerce Act:

> "The non-owning railroad, on whose lines a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per car per day."

The Commission is now issuing an interim report adopting the principle of the proposed rule and reopening the

proceeding for further evidence concerning its costs, benefits, and feasibility of implementation. Although participants are not precluded from advancing any arguments or evidence which they believe may aid the Commission in the disposition of this proceeding, the interim report delineates certain areas in which participants are encouraged to focus their presentations.

Several owners and lessees of private freight cars filed statements in the initial proceeding in support of the application of the remittance plan to private cars. The Commission has recognized merit in their position and has decided to allow private car participation if the rule is finally implemented.

This notice is being given to clarify the application of the rule in regard to private cars and to allow anyone affected or interested in this application adequate opportunity to participate in the further proceedings herein in order to protect their interests or otherwise express their views on this aspect of the proceeding. Also, since liberal intervention will be allowed, anyone desiring to participate in order to present evidence and arguments concerning the other issues in the further hearing is encouraged to do so by written statements.

Initial statements are due 120 days from the date of service of the interim report and reply statements are due 30 days thereafter. Any further motions or petitions should be filed within 30 days after reply statements are due.

It is ordered, That this notice of further and amended rulemaking proceedings be served upon the parties, and furnished to the general public by mailing a copy of this notice and order to the Governor of every State and to the Public Utilities Commission or Board having jurisdiction over transportation in each State, by depositing a copy of this order in the office of the Secretary, Interstate Commerce Commission, Washington, D.C., for public inspection,

and by delivering a copy thereof to the Director, Office of the Federal Register, for publication in the Federal Register.

By the Commission.

ROBERT L. OSWALD,
Secretary

(SEAL)

APPENDIX H

INTERSTATE COMMERCE COMMISSION

[49 CFR Chapter X]

[Ex Parte No. 289]

COMMON CARRIERS OF PROPERTY BY RAIL
Remittance of Demurrage Charges

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 24th day of February 1976.

This proceeding was instituted on our own motion pursuant to section 1(6) of the Interstate Commerce Act as well as other relevant sections of Part I of the Act for the expressed purposes of (1) creating an added incentive for the railroad car owner to acquire additional cars and (2) removing any inducement on the part of the non-owner railroad to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

In the interim report, 349 I.C.C. 411 (1975) it was found that adoption of the following proposal was warranted in principle:

> The non-owning railroad, on whose lines a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per car per day.

It was also determined that private car owners or lessees should participate, if the proposal is ultimately adopted on an equal basis with carrier car owners. The proceeding was reopened for further evidence, with the principal focus on the costs, benefits, and feasibility of implementation of the proposal. Further statements, replies and motions have been received and are under active consideration.

Section 211 of Pub. L. 94-210, the Railroad Revitalization and Regulatory Reform Act of 1976, enacted February 5, 1976, 90 Stat. 31, amended the Interstate Commerce Act, as here relevant, by inserting at the end of section 1(6) the following new sentence which appears consistent with the announced purposes of this proceeding:

> Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

In view of the fact that this proceeding was instituted pursuant to section 1(6) as well as other relevant sections of Part I of the Act prior to the addition of the new sentence, it appears appropriate to solicit the views of the parties and other interested persons, as to what effect, if any, the recent amendment of section 1(6) has on this proceeding.

Comments on the amendment to section 1(6) of the Act are due March 29, 1976. Persons not now parties to this proceeding may file their comments without the necessity of filing motions for leave to intervene. All parties and other interested persons desiring to comment on the effect of the amendment of section 1(6) are cautioned not to introduce evidence or arguments on issues unrelated to the new legislation.

It is ordered, That this notice be served upon all of the parties to this proceeding, and furnished to the general public by mailing a copy of this notice and order to the Governor of every State and to the Public Utilities Commission or Board having jurisdiction over transportation in each State, and by depositing a copy of this notice and order in the office of the Secretary, Interstate Commerce Commission, Washington, D.C., for public inspection, and

by delivering a copy thereof to the Director, Office of the Federal Register, for publication in the FEDERAL REGISTER.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

Supreme Court, U.S.
FILED
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Nos. 78-1049 and 78-1069

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A33) [1] is reported at 583 F.2d 678. The "Interim Report" of the Interstate Commerce Commission (Pet. App. A35-A85) is reported at 349 I.C.C. 411. The final decision of the Commission (Pet. App. A86-A139) is reported at 353 I.C.C. 567.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1978. A petition for rehearing was denied on October 5, 1978 (Pet. App. A34). The petition for a writ of certiorari in No. 78-1049 was filed on December 28, 1978, and the petition in No. 78-1069 was filed on January 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission may require a delivering railroad to remit to the owner of a railroad freight car a portion of the demurrage charges the delivering railroad collects from the shipper or receiver.

2. Whether such a remittance of demurrage charges to a shipper that owns its freight cars is a "rebate."

3. Whether the Commission's failure to meet a statutory time limit for concluding an administrative

[1] "Pet. App." refers to the separately bound appendix to the petition in No. 78-1069.

proceeding requires that an otherwise lawful rule promulgated in that proceeding be invalidated.

STATEMENT

Railroads leave freight cars with shippers and receivers of freight for loading and unloading. Shippers and receivers must pay a fixed amount of "demurrage" if they keep the cars beyond an alloted "free time." [2] Traditionally, demurrage payments have been made to and retained by the delivering carrier without regard to whether it owns the freight car. The rule adopted by the Commission in this case (Pet. App. A137-A139) requires that the delivering carrier pass on to the owner of the freight car demurrage payments of more than $10 per car per day.[3]

The rule is part of a continuing attempt by the Commission to remedy the longstanding national shortage of freight cars, a shortage chiefly attributable to the inadequate number of cars owned by the

[2] Until very recently, after two days of "free time" demurrage charges were $10 per day for the first four days, $20 per day for the next two days, and $30 per day after that. *Demurrage Rules*, 340 I.C.C. 83 (1971). On February 1, 1979, these charges were raised to $20, $30 and $60. Suspension Case No. 68867, *Increased Demurrage Charges, Nationwide*, February 1979 (January 31, 1979).

[3] The rule is not yet in effect. The Commission stayed the effectiveness of the rule pending judicial review (Pet. App. A140-A141).

nation's railroads.[4] As part of its effort to encourage the purchase of cars, the Commission initiated this proceeding in 1972 and proposed the following rule (Pet. App. A36):

> The non-owning railroad, on whose lines a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day.

After considering public comment on the proposed rule, the Commission issued an "Interim Report" (Pet. App. A35-A85). The report concluded that the Commission had statutory authority to issue the rule (Pet. App. A39-A41), that the rule should apply to all cars, not only to those owned by railroad companies (Pet. App. A69-A72), and that the rule would not result in illegal rebates from railroads to shippers who own their own cars (Pet. App. A71-A72). The Commission reopened the proceeding to receive additional comment, and it posed specific questions for participants (Pet. App. A81, A83-A85).

During this period, Congress undertook to reform many of the Commission's powers and procedures. In response to a request from the House Committee on Interstate and Foreign Commerce for comments on the bill that was later enacted as the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (the 4-R Act), the Act-

[4] See *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 230-231 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743-746 (1972); *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184 (1975); see also Pet. App. A12-A13.

ing Chairman of the Commission informed the Committee (Pet. App. A17-A18 n.27, A95):

> The purposes of the [pending demurrage] proposals are to create an added incentive for the car owner to acquire additional cars and to remove any inducement to the non-owner to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

Section 211 of the 4-R Act, 90 Stat. 46, reflects this concern.[5] It amended Section 1(6) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1(6), to provide:

> Demurrage charges shall be computed [by the ICC], and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

In explaining Section 211 of the Act, the Conference Committee stated that the provision "requires the Commission to establish rules and regulations for the computation of demurrage charges so that freight car utilization is maximized and car owners receive adequate compensation" (Pet. App. A94).[6]

Relying on Section 211 of the 4-R Act (Pet. App.

[5] This provision is now codified as 49 U.S.C. 10750. See Pub. L. 95-473, 92 Stat. 1337. For purposes of convenience, we refer to the statutes by the designations in effect when the court of appeals rendered its decision.

[6] See also Section 212 of the 4-R Act, 90 Stat. 46, which expresses "the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars."

A90-A96), the Commission adopted the proposed demurrage rule (Pet. App. A137-A139).

The court of appeals affirmed (Pet. App. A3-A33). The court concluded that Section 1(6), as amended by Section 211 of the 4-R Act, gave the Commission adequate authority to adopt the rule (A14-A19), that the Commission's balancing of the benefits and burdens of the new rule was "rationally supported" (Pet. App. A24), and that the rule does not result in illegal rebates (Pet. App. A31-A33). The court rejected an argument that the rule should be set aside because it was not issued within a time limit established by the 4-R Act for certain formal investigative proceedings (Pet. App. A26-A30).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioners argue (B & O Pet. 6-10) that the Commission has no authority under Section 1(6) to "divide" demurrage revenues by requiring a delivering railroad to remit a portion of those revenues to the railroad car owners. They contend that the Commission's order exceeds its authority to require rail carriers to "compute" demurrage charges.

But, as the court of appeals correctly concluded, "the provision not only directs the ICC to compute demurrage charges * * * but also mandates the agency to establish 'rules and regulations relating to such charges' " (Pet. App. A16). "[W]hile the language of § 1(6) does not specifically authorize remittance to car owners, it is equally clear that the statute does not prohibit such an arrangement" (*ibid.*).

Furthermore, the court correctly concluded that the legislative history of the 4-R Act fully supports the Commission's interpretation of Section 1(6). Congress was aware of the Commission's proposed demurrage rule and did not disapprove it (Pet. App. A17). The Conference Report reflects an understanding that the Commission would be required to establish rules to ensure that "car owners receive adequate compensation." H.R. Rep. No. 94-781, 94th Cong., 2d Sess. 135 (1976).[7] This rule has done just that.

2. Petitioners argue (B & O Pet. 12-13; A & S Pet. 6-12) that remittance of demurrage charges to shipper-owners amounts to rebates to shippers that are illegal under Section 1 of the Elkins Act, 49 U.S.C. (1976 ed.) 41(1) (which prohibits transportation service at less than the tariff rates)[8] and Section 15(15) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 15(15) (which authorizes carriers to establish a tariff charge or allowance applicable when a shipper furnishes a freight car).[9] The court of appeals correctly answered this contention (Pet. App. A31-A32):

---

[7] Although the court of appeals found it unnecessary to consider other sources of the Commission's authority to issue the demurrage rule (Pet. App. A14 n.17), both the Commission's interim report and its final report relied on several statutory provisions that predated the 4-R Act (Pet. App. A39-A41, A95, A128).

[8] This provision now is codified as 49 U.S.C. 11903.

[9] This provision now is codified as 49 U.S.C. 10747.

> [P]etitioners have misconstrued the purposes of § 15(15) and § 41(1), as well as the concept of demurrage. Sections 15(15) and 41(1) were designed to ensure reasonable and nondiscriminatory rates and charges, and to prevent any type of departure from published transportation rates. In contrast, the essential nature of demurrage is that of a car service regulation. Consequently, we do not believe that a demurrage charge can properly be understood as a "rate" under § 41(1), or as a "charge" as that term is used in § 15(15). Unlike the use of the terms in those provisions, demurrage remittance relates not to rail carriers' property, but to excessive delay caused by the shipper or receiver in the loading or unloading of freight cars. Furthermore, it is neither a "charge and allowance" paid by the railroads for use of freight cars nor a reduction of the railroads' rates for owner-shippers. Rather, demurrage is a cost imposed upon the receiver, the penalty portion of which will be transmitted to the owner by the delivering carrier.

Although petitioners take issue (B & O Pet. 12-13; A & S Pet. 6-8) with the court's characterization of demurrage as a regulation of car service, there is nothing novel in the court's holding. It follows the principle, long settled by decisions of this Court and the lower federal courts, that demurrage charges are unique, neither "rates" nor "penalties" in the conventional sense, but "an integral part of the established rules and regulations relating to the use and movement of cars." *Iversen* v. *United States*, 63 F. Supp. 1001, 1005 (D. D.C.) (three-judge court),

aff'd, 327 U.S. 767 (1946). See *Pennsylvania R.R.* v. *Kittanning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920); *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 190 (1975).[10] The demurrage charges established by the Commission have none of the evils of rebates. They simply discourage undue delay in returning cars and, by increasing the economic returns to car owners, make cars a more attractive investment. They do not prefer one class of shippers over another; they treat all car owners equally. And the rules require payment only in the event lengthy delay actually takes place. Whatever the charges may be called, Congress did not prohibit them.

3. Former Section 17(14)(b) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 17(14)(b)—a provision added by Section 303(b) of the 4-R Act—directed the Commission to conclude, by February 1977, all formal rail investigative proceedings that had been pending for at least three years when the Rail Act was adopted. Petitioners contend (B & O Pet. 10-11) that the Commission's demurrage rule proceeding was within that class and, because the proceeding was not concluded until April 1977, the resulting rule should be invalidated.

---

[10] Petitioners' contention (A & S Pet. 6-12) that the decision below violates the doctrine of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), is frivolous. Petitioners made their rebate argument to the Commission (Pet. App. A53), which rejected it (Pet. App. A71-A72, A125). Petitioners renewed their argument in the court of appeals, which also rejected it. *Chenery* prohibits a court from substituting its own grounds for those of the agency in reviewing agency action, but that did not occur here.

In our view, this proceeding was not within the statutory class because it was not a "formal investigative proceeding" and because the 1975 notice of amended rulemaking effectively instituted a new proceeding that had not been pending for three years on the date the 4-R Act was passed.

At all events, although the court of appeals held that the time limit applies to this proceeding (Pet. App. A26-A29), it correctly concluded that the Commission's failure to meet the statutory deadline did not invalidate the otherwise lawful rule. Congress provided in Section 17(14)(a)—which imposes a time limit on proceedings begun *after* the Rail Act became effective—that any such proceeding which is not timely concluded "shall automatically be dismissed."[11] The absence of a similar sanction—or indeed any sanction at all—in Section 17(14)(b) strongly suggests that Congress did not intend to invalidate otherwise lawful rules issued in proceedings begun before passage of the 4-R Act. Congressional oversight, rather than judicial review, is the mechanism contemplated for ensuring compliance with the deadline imposed by former Section 17(14)(b). Congress omitted Section 17(14)(b) from the recodification of the Interstate Commerce Act because that tion of the Interstate Commerce Act because that section was, in Congress' view, "executed."[12] Congress has thus determined that its directive in Section 17

[11] Section 17(14)(a) is now codified as 49 U.S.C. 11701(c).

[12] H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 247 (1978).

(14)(b) is no longer necessary, and there is no reason for this Court to revive it.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1979

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Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1978

—o—

NO. 78-1049

—o—

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL.,

Respondents.

—o—

NO. 78-1069

—o—

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

—o—

BRIEF OF RESPONDENTS BURLINGTON NORTHERN INC. AND UNION PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

—o—

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BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, ET AL.,
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Respondents.

BRIEF OF RESPONDENTS BURLINGTON NORTHERN INC. AND UNION PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether the Commission's demurrage remittance rule is a division of joint rates requiring it to follow the procedures and standards of former § 15 (6) (a) of the Interstate Commerce Act (now 49 U. S. C. 10705 (b) and (e))?

2. Whether the Commission's order is invalid under former § 17 (14) (b) of the Interstate Commerce Act?

3. Whether the Commission's own order permits unlawful rebates contrary to the provisions of former §§ 6 (7) and 15 (15) (a) of the Interstate Commerce Act (now 49 U. S. C. 10761 and 10747) and former § 41 (1) of the Elkins Act (now 49 U. S. C. 11903)?

STATEMENT OF THE CASE

Petitioners here have sought review of a Third Circuit decision, 583 F. 2d 678 (1978), unanimously affirming the Interstate Commerce Commission decision in Ex Parte No. 289, *Remittance of Demurrage Charges by Common Carriers of Property by Rail,* 353 I. C. C. 567 (1977).

The Commission instituted Ex Parte 289 as part of its continuing effort to deal with freight car shortages which have plagued American railroads and rail shippers for at least two decades. As early as 1947, the Commission had recognized the inadequacy of the Nation's rail car fleet. *Car Service, Freight Cars,* 268 I. C. C. 687 (1947). During the past few years, the Commission has undertaken a number of major efforts to ease the car shortages — adopting various rules to regulate freight car placement and movement; establishing a uniform schedule of "per diem" charges, the rents paid by one railroad for the use of another railroad's cars; adding an incentive element to basic per diem charges; and imposing various increases, both temporary and permanent, in demurrage charges. Ex Parte 289 was one of many proceedings aimed at increasing the rail car fleet and obtaining better utilization from the existing car fleet.

Historically, demurrage, which is the charge imposed on shippers and receivers for the detention of freight cars beyond the alloted free time period for loading and unloading, has played an essential role in encouraging efficient car utilization.

Demurrage charge have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention. Demurrage is not a revenue measure. *Turner Lumber Co. v. C., M. & St. P. Ry.,* 271 U. S. 259, 262 (1925).

In 1971, the Commission authorized substantial increases in demurrage charges because existing charges were no longer adequate to encourage prompt release of cars and make them available for the movement of goods. That proceeding allowed demurrage charges in increments of $10, $20 and $30, per car per day, depending on the length of the detention period. *Demurrage Rules and Charges, Nationwide,* 340 I. C. C. 83 (1971).[1] As a result of these as well as earlier increases in demurrage charges, the penalty element of the demurrage charge became significantly greater than the other element, which compensates the collecting railroad for per diem paid the car owner and other related expenses.

With this background, the Commission decided in October, 1972 to institute Ex Parte No. 289, *Remittance of Demurrage Charges by Common Carriers of Property by Rail,* to determine whether remittance of the penalty portion of the demurrage charge to the owning line (while allowing a collecting line to retain adequate compensation to cover its per diem, use of tracks, administrative expenses, *etc.*) would create an added incentive for the railroad car owner to acquire additional cars and remove

1 On January 31, 1979, the Commission authorized further increases in demurrage charges. Effective February 1, 1979, the charges increased to $20, $30 and $60, per car day, depending on the length of the detention period.

any incentive of the nonowner railroad to encourage detention of foreign cars to benefit from collection of demurrage charges. Following appropriate Federal Register publication, interested parties participated in the Commission proceeding by submitting written initial and reply statements of fact and argument.

After careful consideration of the parties' submissions, the Commission issued a 1975 interim report (349 I. C. C. 411; BOCT A35)[2] finding, among other things, that the Commission had jurisdiction under its car service powers to allocate demurrage receipts as it proposed and that adoption of the rule was warranted in principle. Specifically, it found that car utilization would be improved and that the greater return on the car owner's investment which result from the adoption of the proposed rule would increase the incentive to invest in freight cars and thereby improve car supply. However, the Commission reopened the proceeding at that time to receive further evidence on the feasibility and implementation of specific rules, and to clarify that the proposed rules, if adopted, would also result in remittances to private (non-railroad) car owners. Participants were asked to submit specific information concerning existing as well as new demurrage records that would be required and the additional expenses that would be incurred by implementation of the proposed rule. Guideline questions were provided to aid participants in the presentation of their material. The notice of the second rulemaking proceeding was published in 40 F. R. 18797 (April 30, 1975). While it encouraged participants to focus on enumerated issues, it left the participants free to advance any argument or evidence which they believed might aid the Commission in disposition of the proceeding.

2 BOCT refers to the Appendix filed by petitioners Baltimore and Ohio Chicago Terminal Railroad Co., *et al.*

One hundred eighteen parties, including 101 rail carriers or carrier organizations submitted evidence in initial and/or reply statements on the merits, feasibility and implementation of the rule, with some parties favoring the proposed rule and some opposing it. In an extensive report and order served April 7, 1977, the Commission reaffirmed its conclusion that it had jurisdiction to promulgate the demurrage remittance rule. It concluded that the adoption of the rule proposed in 1975, as slightly amended, would be in the public interest, reasonable and otherwise lawful and would contribute to the maintenance of an adequate freight car supply (353 I. C. C. 567; BOCT A86).

Following petitions for reconsideration, which were denied by the Commission, petitioners Aliquippa and Southern Railroad Company, *et al.*, and petitioners Baltimore and Ohio Chicago Terminal Railroad Company, *et al.*, sought review of the Commission's decision before the U. S. Court of Appeals for the Third Circuit. The cases were consolidated, and on September 6, 1978, the Court of Appeals upheld the Commission's action. Specifically, the Court of Appeals held that the Commission's action was a valid exercise of its authority under former § 1 (6) of the Interstate Commerce Act, which authorized it to promulgate rules and regulations relating to demurrage charges, and that the proposed rule was not arbitrary and capricious under the 5 U. S. C. 706 (2) (A) standard of judicial review applicable to notice and comment rulemaking (BOCT A3).

Further, the Court rejected petitioners' claim that this rule, by including private car owners among the

remittance recipients, permits unlawful rebates to shippers who are private car owners in violation of former § 15 (15) of the Interstate Commerce Act, now 49 U. S. C. 10747, and former § 41 (1) of the Elkins Act, 49 U. S. C. 11903. While the Court did not directly address the petitioners' claim that the Commission should have followed the procedures of former § 15(6)(a) of the Act, 49 U. S. C. 10705, concerning divisions of joint rates, the Court's decision that demurrage charges are not rates in the usual sense disposes of that contention.

—o—

ARGUMENT

I.

The Commission's action was an exercise of its car service and demurrage powers. It did not prescribe divisions of joint rates, and the provisions of Section 15 (6) (a) have no effect on the Commission's action.

The entire "division of revenue" argument of petitioners BOCT, *et al.*, rests on the erroneous premise that the Commission was prescribing divisions of joint rates, rather than exercising car service and demurrage powers in its rulemaking proceeding.

As recently as *I. C. C. v. Oregon Pacific Industries, Inc.*, 420 U. S. 184 (1974), this Court has reaffirmed that demurrage is a "rule" respecting "car service" within the meaning of § 1 (15). This Court stated:

> "We noted in *Allegheny-Ludlum* that § 1 (15) traces back to the Esch Car Service Act of 1917, 40 Stat. 101. 406 U. S., at 744. The use of freight cars as warehouses—the practice which prompted the Commission to act in the present case—was one of the evils at which the original Car Service Act was aimed." *Oregon Pacific Industries* at 188.

Continuing, this Court (*id.* at 190) cited *Iversen v. United States*, 63 F. Supp. 1001, *aff'd per curiam*, 327 U. S. 767 (1945), which concludes demurrage is not a rate within the usual meaning of the word.

The Court of Appeals' decision below, as well as the Commission decision, are in complete accord with the foregoing holdings of this Court. The Court of Appeals relied heavily on *Iversen*, stating at page 691 (BOCT A32):

> "As Judge Prettyman observed in his oft-quoted opinion in *Iversen v. United States:*
>
> > '[D]emurrage charges are in part compensation and in part penalty; . . . in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are *sui generis*. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and regulations. They could not have been sustained as carrier charges or as penalties.' "

Clearly, then, demurrage charges, rules and regulations relate to car service, and the Commission's power to act on demurrage matters arises under its car service powers.

The Commission did not rely exclusively on former § 1 (6), now 49 U. S. C. 10750, as the petitioners urge. The 1975 interim Commission decision found jurisdiction to impose the demurrage remittance rule under §§ 1 (11), 1 (14) (a), and 1 (15)—the Commission's car service powers (BOCT A40-A41). Later, in its final report and order, the Commission indicated that § 1 (6) added by the Railroad Revitalization and Regulatory Reform

Act of 1976 (4R Act) during the Commission proceedings, further substantiated its jurisdiction to promulgate the proposed rule. The Commission ultimately found, "That the Commission has jurisdiction under section 1 (6) of the act, as amended, *and* under its car service powers to consider the proposed demurrage remittance rule." (BOCT A128, emphasis supplied). Thus, the Commission did not rely on § 1 (6) alone, but rather based its action on both § 1 (6) and the Commission's other car service powers. Obviously, since the Court below held that § 1 (6) provided "the necessary authority to promulgate the demurrage remittance rule," it was not compelled to examine additional statutory bases for the Commission's action (Footnote 17, BOCT A14).

Demurrage charges in no way resemble joint rates, and the Commission was not required to proceed as if it were prescribing divisions of joint rates. The essential feature of a joint rate is that connecting railroads agree on a rate for the carriage of traffic from points on one road to points on another road for an aggregate charge which is less than the sum of their local charges between the same points. *See Chicago, M. St. P. & P. Ry. Co. v. United States,* 366 U. S. 745, 747 (1960). By its very terms, former § 15 (6) (a), now § 10705,[3] defines the Commission's power to prescribe joint classifications, joint rates, division of joint rates, *etc.* It is clear that demurrage rules and charges are not joint rates or charges under former § 15 (6) (a), but rather are in the words of *Iversen, sui generis.* Therefore, the Commission need

3 While a former § 15 (6) (a) referred to prescription of divisions of joint rates and *charges,* the recodification eliminated "charges," apparently as surplusage under the new definitions.

not follow the procedures of former § 15 (6) (a), now § 10705, in promulgating demurrage rules and regulations.

The Fifth Circuit's decision in *Aberdeen & Rockfish R. Co. v. United States,* 565 F. 2d 327 (5th Cir. 1977), is not at odds with the Third Circuit's opinion below. At issue in *Aberdeen & Rockfish* was the propriety of a surcharge one railroad added to its joint freight rates with other railroads and the resulting change in divisions of the joint rates for the movement of traffic. Because demurrage is not a joint rate, *Aberdeen & Rockfish* would not be determinative of any issue in the instant controversy. The BOCT petitioners' attempt to find a conflict between these decisions (p. 9) is unavailing.

II.

The Third Circuit correctly determined that § 17 (14) (b), unlike § 17 (14) (a) which was enacted at the same time, contained no sanction, and moreover, that a court-imposed sanction would not be equitable or consistent with statutory aims.

The Commission in its 1975 interim report approved the proposed remittance rule in principle, but, largely at the urging of the petitioners before this Court, reopened the proceeding for further evidence regarding costs and administrative feasibility. It also reopened to make clear that the proposed rule would provide demurrage remittances not only to railroad owners, but also to private car owners. With these changes, the Commission invited participation from new parties and indicated that leave to intervene would be granted liberally (BOCT A79-A80).[4] New parties did in fact intervene, including the

4 Further contemporaneous discussion of the reopening appears in a Notice of Proposed Further and Amended Rulemaking. 40 F. R. 18797 (April 30, 1975).

private car respondents presently before this Court, Duval Sales Corporation, *et al.*

Subsequently, § 303 (b) of the Railroad Revitalization and Regulatory Reform Act of 1976, P. L. 94-210, 90 Stat. 31, February 5, 1976, amended § 17 of the Interstate Commerce Act by inserting therein a new paragraph (14) with two related but decidedly different provisions, as follows:

> "(14) (a) Any formal investigative proceeding with respect to a common carrier by railroad which is instituted by the Commission after the date of enactment of this subdivision shall be concluded by the Commission with administrative finality within 3 years after the day on which such proceeding is instituted. Any such proceeding which is not so concluded by such date shall automatically be dismissed.
>
> (b) Within one year after the date of enactment of this subdivision, the Commission shall conclude or terminate, with administrative finality, any formal investigative proceeding[5] with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been pending before the Commission for a period of 3 or more years following the date of the order which instituted such proceeding."

Section 17 (14) (a) requires that certain proceedings instituted *after* the 4R Act be concluded within three years, and if not so concluded, "*shall automatically be dismissed.*" (Emphasis supplied.) No such death sentence provision appears in § 17 (14) (b) which was enacted at the same time. Section 17 (14) (b) relates only

5 Respondents herein do not concede that the informal rulemaking in Ex Parte 289 instituted under 5 U. S. C. 553 of the Administrative Procedure Act was a "formal investigative proceeding" or that the 1975 reopening with new issues and new parties did not commence a new proceeding.

to proceedings initiated *before* the 4R Act. The Court below logically concluded: "This distinction in the language of the two sections indicates the desire on the part of Congress not to place ongoing proceedings under the same absolute time limit as proceedings instituted subsequent to the enactment of the 4R Act." (BOCT A30). The practical distinction between the two provisions boils down to a matter of equity and adequate notice for the Commission. With respect to proceedings instituted *after* the 4R Act, the Commission would be on notice from the start that, if too prolonged, they would "automatically be dismissed." However, the Commission could not be expected abruptly to terminate ongoing proceedings like Ex Parte 289 instituted *before* the 4R Act.[6] "Automatic dismissal" cannot be read into § 17 (14) (b) where it has been so clearly omitted.

The Court below further found that, as an equitable matter, injunctive relief barring enforcement of the Commission's order would be inappropriate due to Congressional aims to alleviate the car shortage, the vast resources expended during the course of the proceeding, and the petitioners' total failure to offer any evidence that they had been unduly prejudiced by the 2-month delay encountered by the Commission which merely served to postpone the eventual enforcement of the order petitioners oppose (BOCT A30, including fn. 61).

Under no circumstances would the "one year limitation" deserve review by this Court. The "one year" by

6 Particularly not in this case when the Commission had to issue a notice three weeks after the 4R Act was adopted soliciting written comments regarding what effects the Act's amendment of § 1 (6) (now 49 U. S. C. 10750) had on the proceeding (BOCT A90).

definition is now past and can have no lasting significance to the administration of the Interstate Commerce Act.

III.

The decisions of the Commission and the Court below allow no rebates or other practices in violation of §§ 6 (7), 15 (15), or 41 (1) of Title 49 (now 49 U. S. C. 10761, 10747, and 11903). These decisions are also consistent with one another and with the decisions of this Court.

The petiiioners attempt to create an impression that the Commission and the Court below would somehow allow the railroads to make payments to shippers which would involve unlawful departures from tariff provisions. This position is frivolous. The Commission has repeatedly demonstrated that it will probingly review situations posing a danger of unlawful rebating or concessions under former § 6 (7) (now 49 U. S. C. 10761) or former § 41 (1), the Elkins Act, now 49 U. S. C. 11903. *See, e. g., Adequacy of Freighthouse Rentals Charged,* 344 I. C. C. 157, 167 (1973); *Grain By Rent-A-Train, IFA Territory to Gulf Ports,* 335 I. C. C. 111 (1969); *Ford Motor Co. Terminal Allowance,* 310 I. C. C. 297, 300 (1960); *South Buffalo Ry. Terminal Services,* 287 I. C. C. 195, 230 (1952); *American Smelting and Refining Corp. Terminal Service,* 270 I. C. C. 359 (1948); *A. O. Smith Corp. Terminal Allowance,* 319 I. C. C. 99, 101 (1963); *Forwarder Rates Conditioned Upon Aggregates of Tonnage,* 264 I. C. C. 225, 234 (1945); *Union Tank Car Co. Terminal Service,* 268 I. C. C. 338 (1947); *Propriety of Operating Practices-N. Y. Warehousing,* 216 I. C. C. 291 (1936). It is beyond belief that the Commission, which has been so vigilant in guarding against unlawful rebates would adopt a plan requiring them.

Clearly, the essence of rebating, whether by direct or indirect means, is discrimination or the unequal treatment of shippers which the railroads are obliged to treat equally. Significantly, the BOCT and Aliquippa petitioners did not in the tribunals below ever contend that remittances to private car owners would be unfair or inequitable.

The BOCT petitioners refer to the remittance rule as a "non-tariff remittitur" (p. 13), perhaps suggesting that the remittance rule adopted by the Commission and with which railroads will therefore be required to comply, should be published in tariff form and not just in the *Federal Register,* the *Code of Federal Regulations,* and Commission documents. There is apparently nothing in the Commission's tariff publishing rules which would prevent such tariff publication if it were desirable. 49 C. F. R. Part 1300 (1977). However, there appears to be no need for tariff publication of the remittance rule. Congress over the last 90 years has given the Commission an awe-inspiring array of powers to enforce compliance with its rules.

The BOCT petition (p. 12) seems to imply that remittance of demurrage charges would result in the carrier's failure to collect the full amount of demurrage charges from the shipper or receiver of freight. But on the contrary, the full amount of demurrage charges would be collected under the remittance rule. The rule specifically provides in pertinent part:

> "(a) Except as otherwise provided hereinafter, the nonowning railroad, on whose lines the car is being detained under demurrage, shall *remit* to the

freight car owner, all demurrage charges *collected*[7] in excess of $10 per car per day." (BOCT A127; emphasis supplied).

The Commission succinctly answered rebate arguments in its final report:

> "For those who argue that the remittance would be an unlawful rebate, we reiterate our position stated in the interim report (349 I. C. C. 411, 438), that rebates are not involved because the delivering carrier will receive its full rate and compensation for all demurrage charges and will merely remit the excess to the car owner." (BOCT A125).

The remittance rule creates a three-part transaction. First, the shipper pays the full amount of the demurrage to the railroad. Second, the railroad retains a portion of the demurrage which is at least equal to its demurrage-related expenses. Third, the railroad acts as a conduit by passing the remainder of the demurrage received from the shipper to a car owner which may be a railroad, a shipper, or a non-shipper, and which will by virtue of the remittance have an increased incentive to acquire cars.

7 Naturally, the nonowning railroad has an obligation to collect all demurrage charges which accrue; any failure to collect those charges would not relieve it of the obligation to remit the amount in excess of $10 to the freight car owner. The Commission stated in its final report, ". . . [W]e note that a carrier is under a legal obligation to collect demurrage charges properly assessed, and the implementation of this rule does not relieve a carrier of this duty." (BOCT A124). Indeed, the Commission's remittance plan is designed in part to prevent recurrence of past carrier failures to collect demurrage charges. The Commission stated in its 1975 interim report:

> "When carriers do not actually collect demurrage charges, an important economic incentive for shippers to release cars with dispatch is lost. Under the proposal herein, the car owner would receive part of those demurrage payments. Faced with the necessity of paying these sums to the car owner, the delivering carrier would have added motivation to pursue the charges again the shippers and receivers. The incentive to release cars would be greater and some improvement in car utilization could reasonably be expected." (BOCT A69).

The Aliquippa petition (see p. 2) urges that certiorari should be granted, reasoning that the Court below sustained the determination of the Commission on the rebating question based upon a rationale not invoked by the Commission itself. The decision of the Court below is not at odds with that of the Commission. The Commission considered the rebate argument, rejected it, and sustained the demurrage rule. Likewise, the Court below considered the rebate argument, rejected it, and sustained the demurrage remittance rule. Further, these tribunals engaged in similar reasoning. The Commission primarily emphasized that the delivering carrier would collect its full charge and be fully compensated (BOCT A125). The Court below primarily focused on remittance from the demurrage charges. It determined that a demurrage remittance fit neither within § 15 (15) nor § 41 (1).[8] Demurrage was unique, *sui generis:*

8 Just as remittances cannot be classified as rebates, neither can they be regarded as allowances under former § 15(15) (49 U. S. C. 10747). An allowance essentially is nothing more than a "reverse rate"—compensation paid by a railroad to a shipper, rather than vice-versa. As earlier noted, *Iversen v. United States,* 63 F. Supp. 1001 (D. C. D. C. 1946), *aff'd per curiam* 327 U. S. 767 (1946), clearly indicated that demurrage is *"sui generis"* and not a rate in the usual sense. Demurrage remittances distinctly differ from allowances in that the remittances involve a penalty element which allowances do not. Precisely owing to this penalty element, the

(Continued on next page)

". . . [D]*emurrage remittance* relates not to rail carriers' property, but to excessive delay caused by the shipper or receiver in the loading or unloading of freight cars. Furthermore, it [demurrage remittance] is neither a 'charge and allowance' paid by the railroads for the use of freight cars nor a reduction of the railroads' rates for owner-shippers. Rather, demurrage is a cost imposed upon the receiver, the penalty portion of which will be transmitted to the owner by the delivering carrier." (BOCT A32, emphasis supplied).

The reliance of petitioners Aliquippa, *et al.*, (pp. 8-9) on *SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947), is badly misplaced. *Chenery* involved a situation in which

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(Continued from previous page)

Commission has long emphasized that demurrage charges are not to be regarded as a source of carrier revenue or equated with freight rates. *Demurrage Rules and Charges, Nationwide,* 340 I. C. C. 83, 87 (1971), *aff'd sub nom, General Mills v. United States,* 364 F. Supp. 1278 (D. Minn. 1973); *Increased Demurrage Charges, 1956,* 300 I. C. C. 577, 585 (1957); *Utah Gilsonite Co. v. A. T. & S. F. Ry. Co.,* 96 I. C. C. 653, 673 (1925); and *Kidston & Co. v. D., L. & W. R. Co.,* 74 I. C. C. 135, 139 (1922). Demurrage remittances also distinctly differ from allowances in that remittances essentially involve a payment from shipper funds to a car owner, with the railroad merely acting as a conduit; allowances on the other hand involve a payment from railroad funds to a shipper. Finally, as shown in Section I of the Argument above, demurrage remittances spring from the Commission's exercise of its car service powers as well as former § 1(6) (now 49 U. S. C. 10750) which requires that the Commission

"establish rules related to those [demurrage] charges, in a way that fulfills the national needs related to—

(1) Freight car use and distribution; and

(2) Maintenance of an adequate supply of freight cars to be available for transportation of property."

a reviewing court *rejected* an agency's rationale for an order and could not substitute its own findings in an area of agency discretion, policy or judgment for those of the agency. The instant situation is markedly different. The Third Circuit did not reject the Commission's findings on the rebate issue or challenge their adequacy. Neither did that Court attempt to substitute its findings for the Commission's. Furthermore, the Court below in handling the rebate matter was not dealing with "a determination or judgment, which an administrative agency alone is authorized to make . . ." such as that involved in the *Chenery* cited by the Aliquippa petitioners. (332 U. S. at 196; Aliquippa pp. 8-9).[9]

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9 This Court has approved the use of a different rationale by a reviewing court than that used by an agency. In *Milk Transport, Inc. v. Interstate Commission,* 190 F. Supp. 350, 354 (D. Minn. 1960), *aff'd per curiam,* 368 U. S. 5 (1961), the Commission dismissed applications for certificates of public convenience and necessity *solely* because citrus juices were not "exempt" commodities *prior* to the Tranportation Act of 1958. Although the applicant argued that the *Chenery* decisions blocked the court from upholding the Commission's decision on grounds other than those specified in its order (*id.* at 354), that is precisely what the Court did. It held that the applicant was not entitled to a certificate because the transportation of citrus juices was not afforded "grandfather rights" by the 1958 Act. The Court distinguished the *Chenery* cases:

"The first Chenery case did hold that a reviewing court must judge an agency order only on the grounds on which the order was based, but the court limited this rule to determinations which the administrative agency alone is authorized to make. (*Id.* at 354).

* * *

"We are not concerned here with a judgment which only the Interstate Commerce Commission can make. . . . We are interpreting the scope of a federal statute and this task is not peculiar to an administrative agency." (*Id.* at 355.)

The main discussion of the *Chenery* issue appears in an earlier decision of this Court, *SEC v. Chenery Corp.*, 318 U. S. 80 (1943). The thrust of that decision was there stated as follows by this Court:

> "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. . . . [A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U. S. at 88.

Determining whether remittances are rebates is not one which is in the exclusive domain of the Commission. Under the Elkins Act, including former § 41(1), the Federal courts are empowered to decide cases involving unlawful rebates and discriminations. In fact, former § 41 (1) (now 49 U. S. C. 11903) makes transportation "(1) at less than the rate in effect under Chapter 107 of this Title, or (2) by practicing discrimination . . ." subject to criminal sanctions (BOCT A146). Since both former § 6(7) (now 49 U. S. C. 10761) and former § 15(15) (now 49 U. S. C. 10747) fall within Chapter 107 of Title 49, both the Court below as well as the Commission have substantial expertise in these areas. The interpretations reached by them are consistent with each other and the decisions of this Court.

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CONCLUSION

The petitions in Nos. 78-1049 and 78-1069 disclose no valid reasons why this Court should engage in an exercise of its supervisory powers. Those petitions should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

No. 78-1069

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Respondents, Duval Sales Corporation, International Minerals & Chemical Corporation, Evans Products Company and Pullman Leasing Company, submit that the judgment of the United States Court of Appeals for the Third Circuit, reported at 583 F.2d 678, presents no special or important issue that warrants issuance by this Court of the requested writ of certiorari.

STATEMENT OF THE CASE

By order entered April 7, 1977, in Ex Parte No. 289, *Remittance of Demurrage Charges by Common Carriers of Property by Rail,* 353 ICC 567, the Interstate Commerce Commission (ICC) adopted a regulation (49 CFR § 1254.10) requiring the remittance to freight car owners of all demurrage charges collected by the delivering carrier that are in excess of ten dollars per car per day.

Petitions for review of that order were denied by the United States Court of Appeals for the Third Circuit, unanimously, by opinion and judgment entered September 6, 1978, in *Baltimore and Ohio Chicago Terminal Railroad Company, et al.* v. *United States, et al.,* 583 F.2d 678. Petitions for rehearing were denied by that Court on October 5, 1978, unanimously.

In upholding the order of the ICC, the Court of Appeals held, *inter alia,* that the ICC's view that former section 1(6) of the Interstate Commerce Act (the Act) (49 USC § 10750) authorized promulgation of the regulation was not unreasonable; that the ICC's failure to comply with the time limits of former section 17(14)(b) of the Act did not require or warrant dismissal of the ICC proceedings; and that the inclusion of private car owners in the ICC's demurrage remittance order did not violate the Act.

NO ISSUE IS PRESENTED WHICH WARRANTS ISSUANCE OF THE WRIT REQUESTED.

The judgment of the Court of Appeals is based upon sound, non-controversial statutory construction which presents no issues warranting full review by this Court.

The determination by the Court of Appeals that it is not unreasonable to interpret 49 USC § 10750 as authorizing the ICC's order is fully consistent with this Court's decision in *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965), and the legislative history of the recent amendment of that statute. The Court of Appeals' ruling that the ICC's failure to comply with the time limits of former 49 USC § 17(14)(b) does not require or warrant dismissal of the ICC proceedings is based upon the lack of such a sanction in the statute and basic equitable considerations, including lack of prejudice to protestants before the ICC. The conclusion of the Court of Appeals that inclusion of private car owners in the demurrage remittance regulation does not violate the Act is based upon the analysis of demurrage charges by Judge Prettyman in the leading case of *Iversen* v. *United States,* 63 F. Supp. 1001 (D. D.C., 1946), aff'd. mem. 327 U.S. 767 (1946), cited with approval by this Court in *ICC* v. *Oregon Pac. Indus., Inc.,* 420 U.S. 184, 190 (1975).

Petitioners' contention that the Court of Appeals upheld the ICC's conclusion that inclusion of private car owners in the demurrage remittance regulation does not violate the Act on grounds not invoked by the ICC is also unsound. Although phrased somewhat differently by the ICC and the Court of Appeals, the essence of the holding of each of those bodies on that point was that inclusion of private car owners in the demurrage remittance regulation cannot result in unlawful rebates to shippers because the demurrage-collecting railroad retains its full published rates and charges in all instances under the regulation.

CONCLUSION

The petitions for writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY MEMORANDUM TO RESPONDENTS' BRIEFS IN OPPOSITION

The Government and railroad respondents misapprehend the position of these petitioners. We neither take issue with the lower court's characterization of demurrage as a facet of car service regulation nor contend that the Commission is without authority under section 1(6) of the Interstate Commerce Act to require the division of demurrage revenues. We say, rather, that the promulgation of any such divisions must observe the standards of section 15(6), as in the case of any other rates or charges. The Government respondents have offered nothing in reply.

The railroad respondents' contention that demurrage charges "in no way resemble" joint rates or

charges within the meaning of section 15(6) (Railroad Brief at 8) flies in the face of the industry practice of collectively establishing demurrage charges under procedures approved by the Commission pursuant to section 5b of the Act. *Railroads Per Diem, Mileage, Demurrage-Agreement,* 353 I.C.C. 673 (1977); *Association of American Railroads-Agreement,* 277 I.C.C. 413 (1950), *modified,* 300 I.C.C. 73 (1957). Their further suggestion (Railroad Brief, note 3 at 8) that the recodification of section 15(6) substantively removed a joint "charge" from its provisions is groundless.[1]

Respondents in their replies give a far broader reading to *Iverson* v. *United States,* 63 F.Supp. 1001 (D.D.C. 1946), and *ICC* v. *Oregon Pacific Industries, Inc.,* 420 U.S. 184 (1975), than the holdings in these cases permit. *Iverson* did not address the question before the Commission and the court below, whether demurrage charges were rates or charges within the meaning of section 15(6) of the Interstate Commerce Act. Rather the question there was whether, for purposes of the emergency provisions of section 1(15) of the Act, demurrage charges were "rules, regulations, or practices then established with respect to car service." As Judge Prettyman said in *Iverson, supra,* 63 F.Supp. at 1003:

> "The question in the case at bar is whether the computation of 'free time' and the scale of demurrage charges are rules with respect to the use, supply or movement of cars. If so, the orders of the Commission, involved in this action, were within its emergency powers; if not, they are invalid because issued without hearing."

[1] The original language of former section 15(6)(a) referred to the divisions of "joint rates, fares, or charges." Language in the recodification of this provision, 49 U.S.C. § 10705 refers to the divisions of joint "rates," which by explicit definition includes a "rate, fare, or charge for transportation." 49 U.S.C. § 10102(19); *See* H.R. Rep. No. 95-1395, 95th Cong., 2nd Sess. 73 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS No. 10, p. 76.

After a lengthy and scholarly discussion of demurrage, Judge Prettyman answered the question:

> "As an integral part of the rules and regulations in respect to car service, they [demurrage charges] fall within the provisions of section 1(15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing, issue, effective for a limited time, orders in respect to these charges." 63 F.Supp. at 1005-1006.

ICC v. *Oregon Pacific Industries, Inc., supra,* 420 U.S. at 190-191, similarly involved only section 1(15); indeed, this Court pointed out that the one question it was deciding pertained to the power of the Commission to promulgate its emergency order reducing the hold time at the reconsignment point.[2]

The ingenious argument most strenuously made by the Government respondents, but made as well by the railroad and shipper respondents, that the doctrine of *SEC* v. *Chenery Corp.,* 332 U.S. 194 (1947), does not apply because both the reviewing court and the Commission concluded that no rebate of rates or charges would result from the division of demurrage ordered distorts completely the rule of that case.[3] The lower

[2] *Oregon Pacific* involved reconsignment, not demurrage, as claimed by Government respondents.

[3] Railroad respondents' reliance upon *Milk Transport, Inc.* v. *ICC,* 190 F.Supp. 350 (D.Minn. 1960), *aff'd mem.,* 368 U.S. 5 (1961), is altogether misplaced. That case involved the construction of the 1958 amendment to the Interstate Commerce Act conferring grandfather rights upon certain classes of motor carriers, a situation that does not obtain here.

court stated that remittance of demurrage charges was not a rebate upon a ground not advanced by the I.C.C. That both the court below and the I.C.C. may have rejected the so-called "rebate argument" but upon altogether different grounds is exactly what *Chenery* is all about.

The holding of the Commission that a rebate does not result because "the delivering carrier will receive its full rate and compensation for all demurrage charges and will merely remit the excess to the car owner" (App. C, p. 70a) was not determined by the Court of Appeals to be an adequate or proper ground upon which the agency could base its decision. In fact, the holding by the Court of Appeals that demurrage was neither a rate nor a charge contradicts the very assertion by the Commission that a delivering carrier will receive its full rate and compensation.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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